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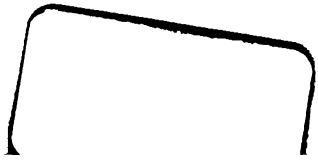

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Common Pleas,

AND

UPON WRITS OF ERROR FROM THAT COURT

TO THE

Exchequer Chamber,

WITH

A TABLE OF THE NAMES OF CASES

AND

A DIGEST OF THE PRINCIPAL MATTERS.

BY

THOMAS JAMES ARNOLD, OF LINCOLN'S INN, ESQ.,

BARRISTER AT LAW.

FROM HILARY TERM, FIRST VICT. 1838.
TO HILARY TERM, SECOND VICT, 1839.
BOTH INCLUSIVE.

LONDON:

HENRY BUTTERWORTH, 7, FLEET STREET; RICHARD PHENEY, 89, CHANCERY LANE; AND G. F. COOPER, LINCOLN'S INN GATEWAY, CAREY STREET.

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JUDGES

OF THE

COURT OF COMMON PLEAS,

During the Period of these Reports.

The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL, Knt., L.C.J.

The Hon. Sir JAMES ALLAN PARK, Knt.

The Right Hon. Sir JOHN BARNARD BOSANQUET, Knt.

The Right Hon. Sir JOHN VAUGHAN, Knt

The Right Hon. Sir THOMAS COLTMAN, Knt.

The Right Hon. THOMAS ERSKINE, (*vice* Sir J. A. PARK, deceased).

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

MEMORANDA.

On Saturday the eighth of December, died the Honourable *Sir James Allan Park*, Knt., one of the Judges of the Court of Common Pleas. He was succeeded by the Right Honourable *Thomas Erskine*, Chief Judge of the Court of Bankruptcy, who was called to the degree of the coif, and gave rings with the motto "*Judicium parium.*" He took his seat on the first day of Hilary Term.

In Hilary Term, 1839, Mr. Baron *Bolland* resigned his seat in the Court of Exchequer, on account of continued indisposition, and in the vacation following, *William Henry Maule*, Esq., one of her Majesty's counsel, was appointed to succeed him, and having first been called to the degree of the coif, gave rings with the motto "*Suum cuique.*" He took his seat in the same Court on the first day of Easter Term.

In Hilary vacation, *William Goodenough Hayter*, Esq., of Lincoln's Inn, received a patent of precedence; and *John Stuart*, Esq., of Lincoln's Inn, *Samuel Girdlestone*, Esq., of the Middle Temple, and *Robert Vaughan Richards*, Esq., and *Griffith Richards*, Esq., of the Inner Temple, were appointed her Majesty's Counsel.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term, 1 Victoria, 1838.

REGULÆ GENERALES.

HILARY TERM, 1838. *12th January.*

IT IS ORDERED, that from and after the first day of this present Term, every rule or order of a Judge, directing the discharge of a defendant out of custody, upon special bail being put in and perfected, shall also direct a *supersedeas* to issue forthwith.

(Signed by the Judges of the Court).

31st January.

IT IS ORDERED, that on and after the first day of next *Easter* Term, every rule for *judgment, as in case of a nonsuit,* after a peremptory undertaking and default, shall be absolute in the first instance.

It is further ordered, that from and after the last day of this present *Hilary* Term, it shall not be necessary to file warrants of attorney to prosecute and defend, previous to, or at the time of signing interlocutory or final judgment, or at any stage of a cause.

It is also further ordered, that from and after the last day of this Term, all judgments may be signed on the morning after the day on which the time for pleading has expired.

It is also further ordered, that on and after the first day of next *Easter* Term, every motion for judgment against the casual ejector, in ejectment in *London* and *Middlesex,* may be heard on any day during the Term.

(Signed by the Judges of the Court).

Common Pleas.

Jan. 12.

DOE, d. BARING *v.* ROE.

Where a tenant has become bankrupt, service of the declaration in ejectment upon the person in possession under the fiat, and also upon the official assignee, is sufficient to entitle the lessor of the plaintiff to judgment against the casual ejector.

W. H. WATSON moved for judgment against the casual ejector. There were three tenants on the premises sought to be recovered, upon two of whom the service was personal; the third had become bankrupt, and the declaration was served upon the person in possession under the fiat, and also upon the official assignee; but there had been no service upon the creditors' assignee.

Per Curiam. That is sufficient.

Rule granted

Jan. 15.

DOE, d. WRIGHT *v.* ROE.

Service on the tenant's servant, who stated the same thing had been tried to be done before without success, and fixing a copy on the door of the dwelling, sufficient to entitle the lessor of the plaintiff to judgment against the casual ejector.

BAYLEY moved for judgment against the casual ejector. The declaration was served upon the tenant's servant, who stated at the time, "Mr. *Wright*, (the lessor of the plaintiff,) has tried to do this before, but could not." A copy of the declaration was also affixed to the door of the dwelling.

Rule granted.

Jan. 16.

ERNEST *v.* BROWN.

Debt for work, goods sold, and on an account stated: *pleas, First, nunquam indebitatus*, except as to 3*l.* 17*s.* parcel of the sum mentioned in the second count. *Secondly*, payment into Court of 3*l.* 17*s.* The only claim applicable to the second count amounted to 5*l.*, and the plaintiff in his particulars, gave the defendant credit for 1*l.* 3*s.* At the trial the plaintiff failed in his proof under the first count, and no evidence was offered on the third, and the judge directed the jury, that from the state of the record, they must find nominal damages for the plaintiff upon the second count. They found a verdict for the plaintiff generally—damages, 1*s.* The prothonotary taxed the costs upon the principle, that this verdict was essentially a verdict for the defendant upon all but the second count:—*Held*, that the verdict should have been so entered, and that it was competent to the judge who tried the cause, to amend the *postea* accordingly.

THE plaintiff declared in *debt;* first count, for work; second, for goods sold; third, on an account stated. The defendant pleaded, except as to 3*l.* 7*s.* parcel of the sum in the second count mentioned, *nunquam indebitatus*, and as to that sum, payment into Court, and that he was not indebted to a greater amount. The plaintiff's particulars contained a great number of charges for assistance rendered to the defendant, in raising a mortgage, and one item of 5*l.* for a cart sold; and an allowance was made to the plaintiff for the sum of 1*l.* 3*s.*

At the trial, before the Lord *Chief Justice*, at the *Westminster* Sittings, after *Hilary* Term, 1837, it was stated in evidence, that the plaintiff was an attorney's clerk, and had undertaken to render such assistance, as a friend, without making any charge; no evidence was offered to meet the last count. The Lord *Chief Justice* directed the jury, that if they believed the defendant's witnesses as to the alleged arrangement between the parties, they ought, nevertheless, from the state of the record, to find a verdict for nominal damages for the plaintiff upon the first issue, as the defendant instead of pleading payment of the sum of 1*l.* 13*s.* had pleaded that he *never was indebted* beyond

the sum paid into Court; and this Court afterwards supported this direction (*a*). The jury found generally for the plaintiff; damages 1*s*.

Upon the taxation of costs, the prothonotary had considered this verdict, looking at the state of the record, as equivalent to a general verdict for the defendant, and had taxed the costs accordingly; whereupon the plaintiff, in *Trinity* Term last had applied to the Court, who being of opinion that the defendant was not entitled to the general costs, had referred the matter back to the prothonotary. The principle of taxation which had subsequently been adopted, was this: the costs were allowed to the plaintiff upon the second count, for goods sold, *only*, and the greater part of the costs relating to the first issue were allowed to the defendant. The plaintiff not being satisfied with this scale of allowance, *Wilde*, Serjeant, had obtained a rule *nisi* on his behalf, in the course of last Term, to refer the matter again to the officer of the Court.

R. Alexander, and *Bayley*, now shewed cause.—They insisted that the principle of taxation which had been adopted was correct; that according to the plaintiff's particulars, he had failed in supporting nineteen-twentieths of his claim; that he only obtained a verdict upon the second count, upon a point of law, and was not entitled to more than the costs referring to that count; that it was clear that the verdict having been entered *generally* was a mistake, which ought not to work injustice; and that the jury intended to confine the shilling damages to the second count, in accordance with the direction of the Lord *Chief Justice;* and, consequently, that the plaintiff was only entitled to his costs upon that count.

Wilde, Serjeant, and *Peacock*, in support of the rule.—There were two questions; first, how the verdict should originally have been entered; secondly, what should be the rule of taxation upon the present state of the record: upon the first point it was submitted, that the verdict was correctly entered, and that it was not competent to the Court now to assume that the jury had intended to limit their verdict to a particular count; the plea of *nunquam indebitatus* applies to the whole of the declaration. As to the second point, the Court could not alter the *postea*, so as to insert a different verdict from that found by the jury. *Reece* v. *Lees* (*b*); *Spencer* v. *Joter* (*c*). If the defendant, however, meant to assert that the Court had the power to alter the record, a substantive application should have been made to that effect, and at a much earlier period, for it was now too late for the Court to entertain such an application. *Jackson* v. *Williamson* (*d*). If the application had been made in time, and the defendant could have satisfied the Court that the general verdict was improper, he might have obtained an arrest of judgment, *Holt* v. *Scholefield* (*e*); or the verdict might have been amended according to the judge's notes. *Eddowes* v. *Hopkins* (*f*). If such an application had been made

(*a*) See the case reported 3 Hodges, 79; 4 Scott, 385; 3 Bing. N.C. 674; 5 D. P.C. 637. One of the learned Barons, however, in the Court of *Exchequer*, has on two occasions intimated a doubt as to the correctness of the above decision. See *Nicholl* v. *Williams*, 2 M. & W. 758; *Kenyon* v. *Wakes*, *Ib.* 764; But see *Brown* v. *Davbeney*, 1 Har. & Wol. 646; 4 D. P. C. 585, *acc.*

(*b*) 7 Moo. 267.

(*c*) 1 H. Bl. 78.

(*d*) 2 T. R. 281.

(*e*) 6 T. R. 691.

(*f*) 1 Doug. 375.

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the plaintiff might have met it by a counter application to set aside the verdict, as being against evidence; but the Court would not now after a lapse of three terms entertain such an application if it were made; the observations of Lord *Ellenborough*, C. J., in *Harrison* v. *King* (*g*), were applicable to the present case; his lordship there said (*h*), "Although the plaintiff might have been permitted to indulge in sleep for a season, he should have been aroused by the writ of error. The moment the writ of error was brrought, it was notice to a man who did not sleep the sleep of death over his rights." That the defendant had ample notice in this instance was clear, from the fact of the case having been already twice before the Court; and once, upon the very question involved in the present discussion. As the Court, therefore, would not now amend the record, it was manifest that in its present state, the principle of taxation is incorrect.

TINDAL, C. J.—The whole difficulty in this case arises from the form of the pleadings. In appearance, there are but two issues, but virtually, there are more. The declaration contains three counts, one for work and labour in preparing a mortgage, one for the price of a cart, and a third upon an account stated; the pleas are—*First*, except as to a certain sum, parcel of the sum claimed in the second count, that the defendant never was indebted; and, *Secondly*, as to that sum, payment into Court; and that he was not indebted to a larger amount. Now, I think that the first issue must be taken distributively, and that it means, that the defendant never was indebted for the work and labour; that he never was indebted, except in the amount paid into Court, for goods sold; and that he never was indebted upon the account stated.

There is a trifling inaccuracy in the reports of this case, when it was formerly before the Court, as to the item of credit, or allowance, given to the defendant, in the plaintiff's particulars of demand. The particulars contained numerous charges for attendances, &c., made out in the form of an attorney's bill; they were cast up and amounted to 10*l.* 15*s.*; then came this item, "deduct allowance made to Mr. *Brown*, 1*l.* 13*s.*," which was subtracted from the former sum, leaving the balance, 9*l.* 2*s.* Then came two or three more charges for attendances, and the last item was, "to a cart, 5*l.*" The sum claimed, with the addition of these latter charges, was 15*l.* 13*s.* 6*d.*

At the trial there was contradictory evidence as to the work and labour; it was proved to have been performed, but evidence was offered on the part of the defendant, to show that there existed an understanding between the parties, that no charge was to be made by the plaintiff for his services. I left it to the jury to say, whether or not the plaintiff's services had been rendered upon the above understanding; and if they found affirmatively, still I was of opinion, that the verdict must be for the plaintiff, with at least one shilling damages; as the defendant, instead of pleading payment or set off, as to the sum of 1*l.* 3*s.*, had pleaded generally, that he *never was indebted* beyond the sum of 3*l.* 17*s.*, whereas, he clearly had been once indebted in the sum of 5*l.*, the price of the cart. The jury found a verdict accordingly, for the plaintiff with one shilling damages, which was entered by the associate, as a verdict for the plaintiff on the first issue, and for the defendant on the second. I

(*g*) 1 B. & A. 161. (*h*) 1 *Ib.* 163.

admit, however, that in the present state of the record, the principle of taxation which has been adopted is incorrect; and then the questions arise, whether the record is in a proper state, and if not, whether it is competent to the Court to alter the *postea*. Now, it is a usual practice to make such an alteration in the entry of the verdict, as, by a reference to the judge's notes will be found best to meet the justice of the case, and the obvious intentions of the jury, and under all the circumstances of this case, it is impossible not to see that it must have been the jury's intention to return the verdict for the plaintiff, upon the count for goods sold only, upon which I so directed them; but then it is said a considerable time has elapsed, and that it is too late now to make such an alteration; but it is probable, that the defendant did not feel himself hurt by the state of the record, till the pressure arose as to the taxation. Agreeing, therefore, that our decision ought not to be one way, and the record another, I would suggest, that the parties had better come before me at chambers, and I will then hear them upon the subject of altering the *postea*, which I am certainly inclined to think would be the proper course; though I will suspend my opinion, till the plaintiff shall have had a fair opportunity of arguing that question. The defendant, however, will understand, that if the matter is not brought before me, his present application will fail. In the mean time, the rule will be suspended.

PARK, J.—Upon the whole of this case, it is manifest that the entry of the verdict in its present shape is a mere slip, unless we are to suppose that the jury were either foolish or mad. It is obvious, that the one shilling damages were given in consequence of what the Lord *Chief Justice* told them, namely, that they must at any rate find a verdict, with nominal damages, for the plaintiff, on the second count, owing to the state of the record. If the jury had intended to find a verdict for the plaintiff on the first count, it must have been either for the whole sum claimed, or at least for a sum which might be supposed to be a reasonable remuneration for the plaintiff's services. It is preposterous to suppose, that the jury could have intended a shilling, or rather the third part of a shilling, as such remuneration. It seems to me, it would be the grossest injustice not to alter the record. With regard to the cases cited, *Spencer* v. *Goter*, and *Reece* v. *Lee* are in favor of the proposed alteration. There is also the case of *Richardson* v. *Mellish* (*i*), where, in *assumpsit* for the breach of an agreement, the declaration containing four counts, some of which were bad in law, the jury had found a general verdict for the plaintiff. The evidence applied to the first count: and even after writ of error brought, and after argument in the Court of *King's Bench*, this Court ordered the *postea* to be amended, by entering the verdict for the plaintiff on the first count, and for the defendant on the other; and they also ordered the judgment roll to be amended by the amended *postea*, after the judgment of this Court had been reversed, and entered of record in the Court of Error. I entertain no doubt, therefore, of the power of my Lord to make the requisite amendment, if he shall think fit to do so.

VAUGHAN, J.—I am of the same opinion. The difficulty in this case arises

(*i*) 11 Moo. 104; 3 Bing. 334; see also *Henley* v. *the Mayor of Lyme Regis*, 3 M. & P. 310; 6 Bing. 100.

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from the state of the record not corresponding with the intention of the jury. It certainly would be incongruous to allow the defendant his costs in the present state of the record; but the real question is, how the verdict ought to have been entered; and, looking at all the facts of the case, it is impossible not to see that the jury intended to negative the plaintiff's right of action, as to the first and third counts, and that they only found even the shilling damages, in obedience to my Lord's direction upon the point of law. No man of common sense, as it appears to me, can apply the shilling damages other than to the second count. We are not precluded from advancing the justice of a case, by the form in which the associate may have accidentally entered the verdict. I certainly agree, that the Court has no power to alter the verdict against the intention of the jury; but in this case, I assume the intention of the jury, from the clearest possible evidence. I think, therefore, that the record should be amended; but, if any costs have been incurred by the defendant's not coming earlier, they should be paid by him.

BOSANQUET, J.—As long as the record is in its present shape, I think the taxation cannot be revised; but I also think, that it is competent to the Lord *Chief Justice* to amend the *postea*, so as to meet the manifest justice of the case, by ordering the verdict to be entered for the defendants, on the first and third counts, and for the plaintiff on the second count, with one shilling damages. My Lord left it to the jury to see whether the plaintiff's services were to be paid for, aye, or no; if aye, the jury were to give him a reasonable remuneration; if not, then at least they were to give him nominal damages, from the state of the pleadings. The jury find a verdict for the plaintiff, with one shilling damages; it appears to me the clearest possible inference, that this amounted to a finding, in fact, that he was not entitled on the other two counts.

Rule suspended, to give the defendant an opportunity to apply to amend the *postea*.

Jan. 16.

BLISSETT *v.* TENANT.

1. Where the defendant objects to a trial taking place on the score of an irregularity in the record, and afterwards conducts his defence under protest:—*Held*, this is no waiver of such irregularity.

2. A writ of trial should correspond with the issue, and if it do not it is an irregularity. Therefore, where the date of the writ of summons had been omitted in the issue, and was inserted by the attorney in the writ of trial:—*Held*, that this was a variance, and the writ of trial was set aside with costs.

WILDE, Serjeant, moved for a rule to set aside the writ of trial in this case, with costs for irregularity. The irregularity complained of was a variance between the writ of trial and the issue. The date of the writ of summons had been omitted in the issue, and the plaintiff's attorney had inserted it in the writ of trial. The cause came on for trial before the Secondary in *London*, on the 22d of *December*, and the defendant's attorney having discovered the variance before the jury were sworn, objected to the trial taking place. The Secondary, however, thought there was no weight in the objection, and accordingly the trial proceeded; the defendant's attorney conducting his cause under protest.

The learned Serjeant contended, that it was necessary that the writ of trial should follow the issue, and therefore, that the insertion of the date of the summons, in the writ of trial, was a variance from the issue. In *Wor-*

thington v. *Wigley* (*a*), the dates of the pleadings were omitted in the issue, but supplied on the roll; and this Court held that it was a variance. So in *Whipple* v. *Manley* (*b*), where a wrong date of the writ of summons was inserted in the writ of trial, the Court of *Exchequer* set aside the trial, and ordered the writ of trial to be amended; and afterwards, in *Wight* v. *Perrers* (*c*), the same Court, upon a similar objection, set aside the verdict. So in *Edge* v. *Shaw* (*d*), where a wrong sum had been indorsed upon the writ of trial, they set the verdict aside, though they allowed the writ to be amended. In *Percival* v. *Connel* (*e*), this Court indeed suspended the rule, in order to allow the plaintiff to amend the writ of trial, but that was a case of indulgence to the plaintiff. In that case the defendant appeared at the trial, but it is not stated, that he made any objection. It may be urged on the other side, that in most of the above cases the defendant did not appear at all; but in this instance, having appeared under protest, he could not be said to have waived his right to object, having had no previous notice of the variance. The present case comes precisely within the principle laid down, by Lord *Ellenborough*, C. J., in *Holt* v. *Meddowcroft* (*f*), where a common jury panel having been returned, together with a special jury panel, and none of the special jury attending at the trial, the plaintiff's counsel proposed to try the cause by the common jury, and although the defendant's counsel objected to this, the cause was so tried; the defendant's counsel appearing, and making defence. Upon the motion for a new trial, it was urged, that the defendant by his appearance, had waived his objection, but his lordship said, "what might have been the effect of the defendant's appearing at the trial and making a defence, without any protest against trying the issue, it is unnecessary at present to enquire, because we find that the defendant did protest, and did all in his power to resist the proceeding. I cannot agree that it amounts to a consent on the part of the defendant, because, being, as it were, tied to the stake, and dragged on to trial, he endeavours to make the best of it."

James shewed cause in the first instance.—The original irregularity consisted in the omission of the date in the issue; that irregularity was waived by the defendant's acceptance of the issue, and it was subsequently set right upon the record. The case of *Wight* v. *Perrers* has been set aside only yesterday, by the Court of *Exchequer*, in a case of *Farwig* v. *Cockerton* (*g*), which was similar to the present, and where *Parke*, B., had amended the writ of trial at chambers: the Court decided that case upon the authority of *Cox* v. *Painter* (*h*), where, after the jury had been sworn in the cause, and the case on both sides was closed, it was discovered that the issue on the *Nisi Prius* record did not contain the date of the writ of summons, and the judge, who tried the cause, amended the record, by supplying the omission, and the Court of *King's Bench* held that he was authorized in so doing, by the proviso attached to the heading of the forms given by the new pleading rules (*i*), viz. "that

(*a*) 5 Dowl. 209.
(*b*) 1 M. & W. 432.
(*c*) 5 Dowl. 463; S. C. 1 Murphy & Hurl. 39; S. C. (nom. *White* v. *Farrer*,) 2 M. & W. 288.
(*d*) 4 Dowl. 189; 2 C. R. & M. 415.
(*e*) 3 Bing. N. C. 877.
(*f*) 4 M. & S. 467.
(*g*) *Vide infra.*
(*h*) 7 C. & P. 767; 1 Will. Woll. & Dav. 228; 1 N. & P. 581.
(*i*) R. H. 4 W. 4.

in case of non-compliance (with the forms there given), the Court, or a judge, may give leave to amend." In all the cases where the Court has not amended, great stress is laid upon the fact of the defendant's not having appeared; but where he has appeared, and fought his battle to the best of his ability, the Court will never allow him to avail himself of a captious objection. The defendant cannot be damnified in the present case; he knows the date of the writ of summons; and when the issue was delivered, with the omission of the date, he should have applied to have it amended; the irregularity is altogether in the issue, and not in the writ of trial. In the form already referred to is given the form of a writ of trial, and it is nowhere there said that the writ must follow the issue. It states, that the date of the writ of summons is to be inserted, and that the declaration and pleadings are to be recited; but from the beginning to the end, there is no reference to the issue; the record, therefore, here is strictly according to the form given, and it would be monstrous to contend, that the plaintiff having fallen into an error in making out the issue, should persevere in it, and engraft it upon the record.

[Mr. *James* in the course of his argument, having mentioned that Mr. *R. V. Richards*, who was in Court, had made the motion in *Farwig* v. *Cockerton*, the Lord *Chief Justice* referred to him for the facts of that case; when the learned gentleman stated, that the variance in that case was, that the date of the summons was inserted in the issue, but omitted in the writ of trial; that the defendant, as in this case, had objected before the jury was sworn, and afterwards conducted his case under protest; that after the trial Mr. Baron *Parke*, upon the application of the plaintiff at chambers, ordered the record to be amended, and that upon the defendant's applying yesterday to set aside such order, the Court refused him a rule (*k*).]

Wilde, Serjeant, in reply.—It would be absurd to contend, that a man, by protesting against a proceeding, could be supposed to acquiesce in it; and it would be hard upon a defendant to be compelled to stand by and hear his character attacked, without taking any part in the proceedings, and merely reserving to himself the right to object to their regularity. This case is stronger than those in which the defendants did not appear, for in such cases, a defendant shewed he was indifferent which way the trial went. Although it is not said in terms, that the writ of trial is to agree with the issue, it was obvious that it ought to do so; for they ought both to be correct transcripts of the roll: it might be said that no rolls in reality exist, but in contemplation of law they do.

TINDAL, C. J.—I am of opinion, that the decision of this Court in *Worthington* v. *Wigley* was correct, and am not disposed to depart from it; that case is similar to the present, the only material difference being, that there the defendant did not appear at the trial, while here he did appear, but under protest; and I agree with what has been said, that it would be hard upon the defendant to be compelled to stand by at the trial and have a speech made against him, possibly involving his character, without being at liberty to make a reply, in order to entitle himself to object to an irregularity in the record. I am clearly of opinion that the writ of trial ought to be a virtual incorpo-

(*k*) See the case reported, 1 Horn & Hurlstone, 71.

ration of the issue; and as the issue here did not contain the date of the writ of summons, the insertion of such date in the writ of trial, constituted a variance. If the plaintiff had persisted in the mistake, the case would have been different, there would have been no variance; and leave might perhaps have been given to amend the omission, though I give no opinion upon that point; but here something is put upon the record, which was not in the issue, and a party has clearly no right to take such liberties with the record.

PARK, J.—I am of the same opinion, and consider the decision in *Worthington* v. *Wigley* to be good law; the difference between that case and the present is in favour of this application. There would be the greatest danger in allowing parties, or their attornies, to alter the records of the Court. As to the defendant's having appeared, I cannot conceive that his doing so under a protest, can put him in a worse situation than if he had retired; the case of *Holt* v. *Meddowcroft* differs from the present case in its facts, but Lord *Ellenborough's* strong language in that case, is peculiarly applicable to the present.

VAUGHAN, J.—I have certainly no inclination to depart from the former decision of this Court; here is a clear variance between the record and the issue, introduced by the insertion of a date by the attorney, and I think we ought not to allow the record to be thus touched by unhallowed and unauthorised hands; it is a great presumption in the parties to do so. As to the argument, that a party, on discovering an error in the record, ought to withdraw from the trial, it seems to me that it would lead, very needlessly, to great expense; having protested against the proceeding, he was under no necessity of standing by and hearing his character attacked.

BOSANQUET, J.—I am also of opinion that *Worthington* v. *Wigley* is an authority in point; indeed, this case is stronger, for that was merely the omission of the dates of the pleadings, while here the omission is the date of the very commencement of the action, which is much more important. It is said, that the form given by the new rules, does not require any recital of the issue, but only that the proper dates should be inserted; but the proper dates are also required to be inserted in the issue; and I hold it to be clear that the writ of trial should accord with the issue. As to the defendant's appearing under protest, I agree with the rest of the Court, for the reasons already given, that it does not amount to a waiver.

Rule absolute with costs.

ESDAILE and others *v.* MARSHALL.

Jan. 16.

THIS was an action by the indorsees against the acceptor of a bill of exchange, which became due in *August*, 1825, in which the plaintiffs had signed final judgment.

Where the defendant resided abroad, and the plaintiff proceeded against him, in a non-bailable action, by a *distringas* to compel an appearance, and signed judgment by default, the Court let him in to plead upon his entering a common appearance, without imposing any other conditions upon him. A judgment under such circumstances is not however irregular.

Common Pleas.

REDAILE v. MARSHALL.

Wilde, Serjeant, obtained a rule *nisi* last Term, to set aside this judgment for irregularity. His affidavits stated, that up to the year 1833, the defendant resided, without concealment, in *England;* that in that year he went to *Boulogne*, where he had been since living, and that no demand upon the bill had been made upon him previously to his leaving *England*. It also appeared, that the present action was commenced by summons, in *January*, 1836; that the plaintiffs, upon an affidavit that they had made enquiries at the defendant's "last supposed place of abode," (but which did not state that the requisite appointments had been made), obtained, from a learned judge at chambers, an order for a *distringas* to compel an appearance; that upon the return of *nulla bona*, the plaintiff entered the appearance for the defendant, and subsequently signed judgment by default against him; and that the first intimation the defendant had of the action, was by the institution of proceedings against him, founded on such judgment, in the local Court at *Boulogne*. The defendant also stated, that he had a good defence to the action; but he did not state that such defence was "upon the merits." The main ground of the defence was stated to be, that the bill had been altered after acceptance. The learned Serjeant argued, that the *distringas* issued irregularly, the defendant being resident abroad at the time. *Fraser* v. *Case* (*a*).

W. H. Watson, now shewed cause.—His affidavits stated, *inter alia*, that the plaintiffs were wholly ignorant of defendant's residence abroad. He submitted, it was in the discretion of the judge to order the *distringas* to issue, and that there was no irregularity in the judgment. The utmost the Court would do, would be to let the defendant in to plead, in which case they might impose conditions upon him, one of which would be, that he should not plead the Statute of Limitations; but confine himself to the defence, as to the alleged alteration in the bill.

Wilde, Serjeant, in reply.

TINDAL, C. J.—It appears to me that, looking at the affidavits upon which the *distringas* issued, and taking into consideration the fact of the defendant's residence abroad, such writ issued improperly, but I cannot say that it was irregular. Under these circumstances, the defendant must be let in to plead, and the only condition we shall impose upon him is, that he enter a common appearance.

Rule accordingly.

(*a*) 1 Dowl. 725; 2 Mo. & S. 720; 9 Bing. 464.

Jan. 16.

NEWTON *v.* SPENCER.

Where an attorney, not admitted in C. P. commenced an action there before the Statute 7 W. 4, and 1 Vic. c. 56, came into operation:—*Held*, he was only entitled to his costs subsequently to that time.

WIGHTMAN had obtained a rule *nisi*, to review the Master's taxation of the costs of the plaintiff's attorney. The action had been commenced in this Court, on the 12th *May*, 1837, by a gentleman who at the

time was an attorney of the other Courts, but had not been admitted in this Court. On the 15th of *July* the royal assent was given to the Statute 7 *W.* 4, and 1 *V.* c. 56; by sec. 4 of which it is enacted, "that any person who shall have been duly admitted an attorney in any one of her Majesty's Courts of law at *Westminster*, shall be at liberty to practise in any other of her Majesty's Courts of law at *Westminster*, although he may not have been admitted an attorney thereof; and that no person, having been duly admitted an attorney or solicitor in any of her Majesty's Courts of Law or Equity at *Westminster*, shall be prevented from recovering or receiving the amount of any costs which would otherwise have been due to him, by reason of his not being admitted an attorney or solicitor of the Court, in which such costs shall have been incurred." The action was continued after that Act came into operation, and the plaintiff had obtained judgment. The learned counsel contended, that the Act was prospective only, and, therefore, that the attorney was not entitled to his costs.

Wilde, Serjeant, now shewed cause, and argued that the Act was retrospective.

Wightman, in reply, repeated his former arguments, and cited *Latham* v. *Hide* (*a*), as an authority to shew, that if an attorney practise in a Court in which he has not been admitted, he cannot maintain an action for his fees; nor even for money out of pocket; in this case, at all events, the attorney was not entitled to his costs, before the Act came into operation.

TINDAL, C. J., (after reading the section of the Act);—I am of opinion that these words are not retrospective. Previously to this Act, no person who was not an attorney of this Court could sue here; this Act, for the first time, enables an attorney of one Court, to transact business in any other, and also to receive fees. The operation of this must be prospective; otherwise, if a suit had been commenced in this Court three years ago, by an attorney of one of the other Courts, who had not been admitted in this, and judgment was not signed till after the Act came into operation, its effect would be, that he might recover all his former costs. The attorney, however, is I think entitled to such costs as have been incurred since the Act came into operation.

Rule absolute, as to so much of the costs as became due before the Act came into operation.

(*a*) 1 Dowl. 594; 1 C. & M. 128. *Jervis* v. *Dewes*, 4 Dowl. 764; *Jones* v. *Jones*, 5 Id. 474; 2 M. & W. 323. But see (as to a country attorney conducting a suit through a London agent),

DYKE *v.* DUKE and another, Sheriff of MIDDLESEX.

Jan. 17.

CASE against the Sheriff of *Middlesex*, for not arresting *R. W. S.* upon a *capias*, at the suit of the plaintiff. *Plea*, that the plaintiff did not before, or at the time of, the delivery of the said writ of *capias* to the defendants,

There is no obligation in law upon a plaintiff upon his delivery of a *capias* to the sheriff, to give him such information as will enable him to identify and arrest the defendant. Therefore, a plea by the sheriff, in an action against him for not arresting, that after the delivery of the writ, and before a countermand by the plaintiff, the latter had given him no such information:—*Held*, bad on demurrer.

Common Pleas.

DYKE v. DUKE.

nor at any time before the commencement of the suit, give or furnish, or cause to be given or furnished to the defendants, nor were they, during any part of the time aforesaid, supplied with, or in possession of, any sufficient description or knowledge of the said *R. W. S.*, or of his person, so as to enable them to discover, recognise, identify, or arrest the said *R. W. S.*; and the plaintiff, during all the time aforesaid, wholly neglected and omitted to give, or furnish to the defendants, any sufficient description or knowledge of the said *R. W. S.*, or of his person, &c.; and the plaintiff, during the time aforesaid, that is to say, after the delivery of the writ, and before the commencement of this suit, to wit, &c., instructed and directed the defendants to forbear to arrest the said *R. W. S.*, whereby and by reason of such instruction and direction, as last aforesaid, the defendants were hindered and prevented from arresting the said *R. W. S.*, &c.

Demurrer inde, stating that the said plea, so far as it is pleaded as a defence to the defendants not arresting the said *R. W. S.*, between the time of the delivery of the said writ, and the time when the plaintiff instructed the defendants so to forbear to arrest the said *R. W. S.*, amounts to no more than a plea of not guilty; and that the said plea being bad in part, is bad for the whole; and that though the plea is pleaded to the whole of the count, it does not confess, and avoid, or traverse and deny the cause of action therein mentioned, so far as it relates to the defendants not taking, or causing to be taken, and arresting the said *R. W. S.*, by virtue of the said writ, between the time of the delivery thereof to the defendants, and the time when the plaintiff instructed the defendants to forbear to arrest *R. W. S.*: and that it is not alleged or averred in the plea, that the defendants gave any notice to the plaintiff that they had not any sufficient knowledge of, or information as to *R. W. S.*, or his person, so as to enable the defendants to recognise or identify, or arrest *R. W. S.*; and that it is admitted by the plea, by implication, that the plaintiff did furnish the defendants with some description of *R. W. S.*; yet it is not averred or alleged, in what respect and why, the description and information were insufficient.

R. V. Richards, (with whom was *Wilde*, Sergeant,) in support of the demurrer. The first part of the plea, if good at all, amounts to the general issue, as it denies the breach of duty alleged to have been committed by the defendant (*a*), in the interval between the delivery of the writ and the countermand of the arrest. But, in fact, it contains no answer at all; the defendants do not even aver that they did not know either who *R. W. S.* was, or that he was in their bailiwick; nor do they traverse the allegations in the declaration, that the defendants had notice that he was in their bailiwick, and that they might have arrested him. The plea assumes that even if the defendants had been acquainted with the person of *R. W. S.*, they were under no obligation to arrest him, unless the plaintiff had pointed him out to them; but there is no pretence for saying that the plaintiff has any such duty cast upon him by law; if it were so, and he failed to give the sheriff the requisite information, the latter might have his action against him in case he lost his poundage. In *Brown* v. *Jarvis* (*b*), it is laid down, that it is the duty of the sheriff to arrest the party on the first opportunity that he can, and that if he does not do so, he is guilty of negligence, and will be liable for any damage which may

(*a*) R. H. 4 W. 4, Pleadings in Particular Actions, IV. (Case); 1 Words. 203.

(*b*) 1 M. & W. 704; 5 Dow. 281.

result from that negligence. The same principle had been established in *Beckford* v. *Montague* (*c*), and also as to the sheriff's duty to sell within a reasonable time after a seizure, under a *fi. fa.* in *Jacobs* v. *Humphrey* (*d*), and *Bales* v. *Wingfield* (*e*). In *Gibbon* v. *Coggon* (*f*), Lord *Ellenborough* certainly ruled that notice of a defendant's being within a bailiwick, given to the under sheriff's agent in town, was no evidence of such notice to the sheriff, which would seem to infer, that such a notice was necessary; but in a later case the Court of *King's Bench* held, that it was not necessary for a plaintiff in a suit, to give notice to the sheriff where he might find the defendant, in order to arrest him; Dean of *Hereford* v. *Macknamara* (*g*). The former part of this plea therefore being bad, the whole of it is bad. *Com. Dig. Pleader*, (c. 36.)

Kennedy, (with whom was *Talfourd*, Serjeant,) in support of the plea. An objection might possibly have been made to the plea, upon the score of duplicity, but as it was not demurred to upon that ground, the plaintiff cannot now take advantage of it, *Hancock* v. *Prowd* (*h*). [*Tindal*, C. J.—I do not see how the plea can be said to be double, as it does not contain two answers to the whole of the declaration; the first part professes to offer an excuse on the part of the sheriff, for not arresting the party up to a certain period; the second part gives another excuse for the non-arrest, *after* that period; namely, the plaintiff's express instructions to forbear arresting; this is, no doubt, a good answer to so much of the cause of action as it seeks to cover, and the only question is, whether the first part of the plea is good or not.] The first part alleges, that the sheriff had no information from the plaintiff to enable him to identify *R. W. S.*; and the question of law will be, whether the plaintiff was bound to furnish the sheriff with such information. The defendant insists that he was. There is certainly no direct authority for such a position. [*Bosanquet*, J.—In actions against the sheriff for not arresting, it is never laid in the declaration as a condition precedent to be performed on the part of the plaintiff.] The plea "states, that the defendants were not in possession of any sufficient description or knowledge of the said *R. W. S.*, or of his person, so as to enable them to discover, recognise, identify, or arrest him." This is a sufficient excuse. In the Dean of *Hereford* v. *Macknamara*, *Bayley*, J., intimated, that the sheriff might have a good defence by shewing that he was ignorant of the person of the party to be arrested (*i*). *Gibbon* v. *Coggon*, is a strong authority in favour of the defendants, and it has never been overruled. The plaintiff is surely bound to set the sheriff in motion, by giving him the requisite information. [*Vaughan*, J.—The delivery of the writ to him, sets him sufficiently in motion.] The only information the writ gives, is as to the name and residence of the defendant, it gives none as to his person. A plaintiff ought to give all the information to a sheriff which he himself possesses. The old doctrine, that the sheriff is bound to know every inhabitant in his bailiwick, will not be resorted to now-a-days (*k*.) [*Tindal*, C. J.—

(*c*) 2 Esp. 475.
(*d*) 2 C. & M. 413.
(*e*) 2 N. & M. 831.
(*f*) 2 Camp. 189.
(*g*) 5 D. & R. 95.
(*h*) 1 W. Saund. 336 c., 337 a., and see 337 b., *n.* (3.)
(*i*) 5 D. & R. 97.
(*k*) "If an officer arrest another man who is not the defendant, he shall be a

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The sheriff is bound to make enquiries.] It is the ordinary practice in the sheriff's office, for the plaintiff to give such information. [*Tindal*, C. J.—Can the Court take notice of the practice of the sheriff's office?] The Court must know that the sheriff never personally interferes in arrests, and that the officer who makes the arrest, is generally appointed by the attorney for the plaintiff. In *Houlditch* v. *Birch* (*l*), the Court did take notice of the practice of taking a defendant to a lock-up-house (*m*). The sheriff is not liable to the parties for every neglect of the King's writ, as is evident from Lord *Coke's* Commentary upon the Statute of *Westminster* (*n*). As to the argument, that this part of the plea amounts to the general issue, the declaration avers that *R. W. S.* was in the bailiwick, and that the sheriff might have taken him; this is mere matter of inducement, but the sheriff was bound to notice it in some manner, and he pleads in confession and avoidance, admitting that the party was in his bailiwick, but alleging that he could not take him, by reason of the want of information. The plea of the general issue, since the new rules, puts in issue only the *fact* of the alleged commission or omission complained of, but not its *wrongful* character. *Stanncliffe* v. *Hardwick* (*o*), *Frankum* v. *Falmouth* (*p*), *Syms* v. *Chaplin* (*q*), *Wright* v. *Lainson* (*r*). Assuming, however, the first part of the plea to be no answer in law, still it would be a question whether it was not surplusage; it appears by the latter part of the plea, that the plaintiff countermanded the arrest, and the negligence, if such it were, on the part of the sheriff, in the short interval between the delivery of the writ and the countermand, was merely passive; he had four months to execute the writ in; there is no special damage laid in the declaration, and the Court will not assume that the plaintiff has sustained any.

TINDAL, C. J.—I am of opinion that this plea is bad. I do not think it is necessary to go into the question as to the general issue, for I think the plea is bad upon other grounds. It purposes to give an answer to the charge in the declaration; now the declaration charges the sheriff with not having arrested the defendant in the former action, according to the exigency of a writ of *capias*, and his duty as sheriff; the defendants, as sheriff, plead that the arrest was countermanded by the plaintiff, but as that defence would not cover the

trespasser, and if the plaintiff shew him the man, and say, that he is the defendant, when that is false, they are both trespassors." Bro. Abr. *Office & Officer*, 8. *Trespass*, 99, citing 11 H. 4, 90. "*Note*, that where there are three of the name of *J. S.*, yeoman in *D.* and one is impleaded, and a *capias* is awarded, and the sheriff taketh another of them, still false imprisonment lieth not, for it is the name in the *capias*, and therefore he hath no remedy but by (writ of) *identitate nominis*; (as to which, see F. N. B. 267.) But the contrary is said in the same year, (*sc.* 5 E. 4.) fo. 84; and that the writ of false imprisonment well lieth, for the *sheriff shall take notice who is sued, at his own peril.* Ib. *Faux Imprisonment*, 19; and see Ib. *Idemptitate nominis*, 9. See also Sir *M. Hale's* Commentary to F. N. B. *ut supra*. *Dalton* says, "therefore it seemeth safer for the sheriff, *in such cases*, to make his return, that there be divers of that name and surname within his county, &c., and that therefore he knew not upon which of them to execute the writ." *Office of Sheriff*, cap. 22, & S. Ib. cap. 61.

(*l*) 4 Taunt. 608.

(*m*) But *quære*, was not such practice proved at the trial?

(*n*) 2 Inst. 449, &c.

(*o*) 1 Gale, 127; 2 C. M. & R. 1; 3 Dowl. 762.

(*p*) 1 Har. & Wol. 1; 4 N. & M. 330; 2 A. & E. 452; 4 Dowl. 65.

(*q*) 1 N. & P. 129; 5 Dowl. 429.

(*r*) 2 M. & W. 739.

whole period of time between the delivery and the return of the writ, they say that prior to such countermand, the plaintiff "did not give or furnish, &c." (his Lordship read that portion of the plea). This, however, is no answer to the charge in the declaration; it assumes that as a condition precedent to its becoming the duty of the sheriff to arrest, it was the duty of the plaintiff to give the sheriff certain information, as to the person of the defendant in that writ; but I am not aware that there is any such duty imposed by law upon a plaintiff: at any rate, the plea would be bad in this respect, that it does not even allege that such was the duty of the plaintiff. There is no precise authority bearing upon the point, but the principle of the case that has been cited, *The Dean of Hereford* v *Macknamara* is certainly strongly against the defendants. They have undertaken to set up a special justification against a charge of negligence, and they are bound to make it out; they have not done so, however, as to part of such charge, and the plea therefore being bad in part, is bad for the whole.

PARK, J.—I am of the same opinion. The case just referred to by my lord is, to my mind, decisive of the present question. The sheriff says the plaintiff was bound to point out the former defendant to him, but *non constat*, that he was himself acquainted with the defendant's person.

VAUGHAN, J.—I own I think that the former part of the plea does amount to the general issue; but independently of that objection, the plea is undoubtedly bad; it is said that taking the two parts of the plea together, they make but one defence; but the first part assumes a duty to exist on the part of the plaintiff, which the defendants have no right to assume; and the second part is clearly no answer to the whole of the action; the plea, therefore, is no defence.

BOSANQUET, J.—I also am of opinion that this plea is bad in substance. (His lordship, after reading the first part of the plea, continued), this, if it were good law, would establish a condition precedent on the part of the plaintiff, of which he would always have to allege and prove the performance, before he could have his right of action against the sheriff. I think it was at least incumbent on the sheriff to aver, that he had used his best endeavours to find out the party.

Judgment for the plaintiff.

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Jan. 17.

COVENANT against the assignee of a lease, for non-payment of rent.

Fourth plea.—That in and by the said supposed indenture, it was provided, that if the said rent should be behind or unpaid for the space of fourteen days next after any of the days of payment, or if the said *A. C.*, (the lessee), his executors, &c., should neglect or fail in, or be guilty of, a breach or non-performance of any of the covenants, &c., in the said indenture contained, on the

1. Where a lease contained a proviso that upon breach of any of the covenants therein, on the part of the lessee, &c., the lessor might re-enter on the premises, "and the same have again, as if the said lease had never been made:"—*Held*, the proper construction of this proviso was, that the lease was to be void from and after the re-entry by the lessor, and not, as was contended, that the lease was thereby rendered void *ab initio*.

2. Therefore, where the lessor having entered for breach of covenant for payment of rent:—*Held*, he could maintain *covenant* against the assignee for the arrears of such rent.

3. In *covenant* for rent in arrear, where the defendant in his plea stated that the lease contained such a proviso as above, and then alleges a breach of covenant by non-payment of six quarters' rent, and a re-entry by the plaintiff in respect thereof: the plaintiff is entitled to treat this plea as divisible, and to reply to part of it, and demur to the residue.

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part of the said *A. C.*, his executors, &c., to be performed and kept, then, and from thenceforth, it should and might be lawful to and for the said plaintiff, his executors, &c., into and upon any part of the said demised premises, in the name of the whole to re-enter, and the same to have again, as if the said indenture had never been made, as by the said indenture, &c. And the defendant saith, that during the said term, in and by the said indenture granted, to wit, on, &c., default was made in the payment of the said rent reserved, that is to say, for the said arrears of rent which the plaintiff seeks to recover in this action, to wit, the said sum of 132*l.*, in the said declaration mentioned, and the said *A. C.*, &c., therein neglected and failed in, and was guilty of a breach and non-performance of the covenants, clauses, conditions, and agreements in the said indenture contained, on the part of the said *A. C.*, &c., to be performed and kept, to wit, in the non-payment of the said rent, for the term and said arrears in the said declaration mentioned. Whereupon the plaintiff, by reason thereof, after the said 132*l.* of the rent aforesaid, for the space aforesaid, had been and was in arrear fourteen days after the day of payment thereof, to wit, on, &c., and before the commencement of this suit, into and upon all and every part of the said demised premises re-entered, and the same had again, as if the said lease had never been made, whereby the said rent reserved and arrears thereof, and the said indenture whereby the same was reserved and granted, became and were extinguished, merged, and released; and this the defendant is ready to verify, &c.

Fifth plea.—That the said supposed causes of action, in the said declaration mentioned, did not, nor did either or any part thereof, accrue within six years next before the commencement of this suit; and this the defendant is ready to verify, &c.

Replications and *demurrers.*—To the 4th plea, except so far as the same relates to the non-payment of 25*l.* of the rent aforesaid, for the space of one quarter of a year of the said term, to wit, the last quarter thereof mentioned in the said declaration, that the plaintiff did not, by reason of the non-payment of the said rent, in the said declaration mentioned, or any part thereof, except the non-payment of the said rent for the last mentioned quarter, into, or upon all or any part of the demised premises re-enter, or the same have again, as if the said lease had never been made in manner and form, as the said defendant hath above in her said fourth plea alleged. And this the plaintiff prays may be enquired of by the country, &c.

And as to the said fourth plea, so far as the same relates to the non-paymnnt of the said sum of 25*l.* of the rent aforesaid, for the said space of one quarter of a year of the said term, to wit, the said last quarter thereof mentioned in the said declaration, the plaintiff says that the said fourth plea, so far as the same relates to the non-payment of the said last mentioned sum of 25*l.*, is not sufficient in law. [The point of law stated in the margin was, that the re-entry did not extinguish the rent then due, or bar the plaintiff's right of action for the non-payment thereof.]

Joinder—To the fifth plea, so far as the same relates to the non-payment of the sum of 25*l.* of the rent aforesaid, for one quarter of a year of the said term, to wit, the last quarter thereof mentioned in the said declaration, that the said cause of action in the declaration mentioned, so far as the same relates to the non-payment thereof, did accrue to the plaintiff within six years next before the commencement of this suit; and this the plaintiff prays may be enquired of by the country, &c.

And as to the said 5th plea, so far as the same relates to all the causes of action in the declaration mentioned, except the non-payment of the said last mentioned sum of 25*l.*, that the said fifth plea, except so far as the same relates to the non-payment of the last mentioned sum of 25*l.*, is not sufficient in law. [The point of law stated was, that the plaintiff's right of action, in respect of the causes of action, to which that part of the plea which is demurred to relates, is not limited to six years.] Joinder.

Demurrers to replications. As to the replication of the plaintiff, as to the plea of the defendant, by her fourthly above pleaded, except so far as the same relates to the non-payment of 25*l.* of the rent aforesaid, for the space of one quarter of a year of the said term, to wit, the last quarter thereof mentioned in the said declaration, that the said replication is not sufficient in law, &c., for that the said replication professes to be an answer to part of the defendant's fourth plea only, whilst the plaintiff demurs to the rest of the said plea. Joinder.

A similar demurrer to the replication of the fifth plea, and Joinder.

Peacock, in support of the first set of demurrers (to the pleas) and the replications.—Three questions arise in this case; first, whether the re-entry of the plaintiff is a bar to the action; secondly, whether six years is the period of limitation to an action of covenant for rent; and thirdly, whether the plaintiff can reply to part of a plea, and demur to another part.

As to the first point.—The re-entry by the plaintiff is no bar to the action; in *Pennant's* case (*a*), it is said, "if the lessor brings an assize for the rent, he relinquishes and waives the benefit of his re-entry, although it be for the rent due at the same day; but if he re-enters first, then he may have an action of debt for the rent behind" (*b*). The plea here is altogether bad; it states that the landlord re-entered for six quarters' rent, which it is clear he could not do; for if, as the the plea admits, the lease was in existence during the time that the last quarter's rent was accruing, the forfeiture as to the five preceding quarters must have been waived. The re-entry, therefore, could only be for the last quarter, *Doe*, dem. *Wheeldon* v. *Paul* (*c*). The plea is bad also upon another ground. At common law, in order to work a forfeiture, there must be a demand of the rent made, with certain formalities; the plea, however, contains no allegation of any demand.

As to the second point, with regard to the Statute of Limitations.—The recent case of *Paget* v. *Foley* (*d*), has decided, upon the construction of the Statute, 3 & 4 *W.* 4, c. 42, s. 3, that six years is not a limitation for an action

(*a*) 3 Rep. 64 a; S. C. (nom. *Harvy* v. *Oswald*); Moore, 426, 456; Cro. Eliz. 553, 572.

(*b*) 3 Rep. 65 a, citing 17 E. 3, 73; 18 E. 3, 10; 30 E. 3, 7; 38 E. 3, 10; Lord *Coke*, however, is here speaking of the case of a lease *for life*, and says, that "in *such* case" the rule applies; but in F. N. B. 120, H. (to which Lord *Coke* also refers *in margine*), it is said, "if a man lease lands *for years*, rendering rent, and for default of payment, that he shall re-enter; if he do re-enter in the land for non-payment of the rent, yet he may have an action of debt for the rent for which he doth re-enter, and in the writ shall recover the rent for which he re-entered." So in Br. Abr. Tit. *Arrearages*, 11, "He who re-enters by a condition for non-payment of rent according to his lease, shall have the land and the rent, and also his arrears, but *quære*, if he does not enter for a year, or half a year after the time of forfeiture, for the remedy for the rent was incurred after the time of the re-entry;" and see Ibid. Tit. *Entre Congeable*, 90; see also in *Walker's* Case, 3 Rep. 23, b.

(*c*) 3 C. & P. 613.

(*d*) 2 Hodg. 32; 3 Scott, 129; 2 Bing N. C. 679.

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of covenant; then, as the second plea is pleaded to the whole of the declaration, being bad in part, it is bad altogether.

The third point arises upon both pleas, to each of which the plaintiff has replied as to part, and demurred as to the residue, and the question here is, whether these pleas are in their nature so divisible as to admit of this method of pleading. The plaintiff contends that they are; it has been held, that where a plea is pleaded to demands, which are in their nature several, the plaintiff may treat such plea as separable in his replication, *Vivian* v. *Jenkins* (*e*); *Cousins* v. *Paddon* (*f*), is to the same effect; therefore, as the plea here is to six distinct quarters' rent, it is the same as if there were a separate plea as to each quarter. Suppose the plaintiff had replied to the whole plea, a verdict might have been found for him in part, and against him in part, according to *Cousins* v. *Paddon*; and if so, the plaintiff might have raised the same question, by moving for judgment *non obstante veredicto* upon the part of the pleas found against him; and if he could do so, why should he not raise the same point upon demurrer, without being driven to the useless expense of going to trial upon that part of the plea, which he must know would be found against him, as being true in fact, though no answer in law. An objection may also be taken to the form of the plaintiff's demurrers to the replications. For he demurs to the replications merely, and alleges as a cause of demurrer, that the plaintiff has demurred to another part of the plea. Now, it is a rule of pleading, that only that part of the pleading, which is demurred to, can be looked at upon the argument of the demurrer. Upon the argument, therefore, of the present demurrers to the replication, the Court cannot look to the pleadings upon the other parts of the plea; and if not, for any thing that appears, the plaintiff may have replied to the other parts of the pleas, and then according to *Vivian* v. *Jenkins*, the replications in question would be good. If the defendant intended to have availed himself of the demurrers to the residue of the pleas, as a reason why the replications demurred to were bad, he should have demurred to the demurrers and replications, as one entire pleading. In *Cheasly* v. *Barnes* (*g*), the defendant demurred to the plaintiff's replication and new assignment, as one joint pleading bad for duplicity; but as there cannot be a demurrer upon a demurrer, this is a strong argument to show that a replication to part of a plea cannot be demurred to, on the ground that another part of the same plea has been demurred to.

Hoggins, contrà—As to the second point, arising upon the Statute of Limitations, the plea must be given up upon the authority of *Paget* v. *Foley*; the pleadings in this case were framed before that decision.

As to the first point, *Pennant's* case does not apply; it is there said, that after re-entry an action of *debt* will lie against the *lessee* for the arrears; but this is an action of *covenant*, not of *debt*; and it is against the *assignee*, not the *lessee*. By the terms of the lease, upon a breach of covenant, the lessor is authorized to re-enter on the premises, "and the same to have again, as if the said indenture had never been made." The plaintiff by his replication admits a re-entry as to the last quarter; then the question arises, what is the meaning of these words in the lease; if, as the defendant contends, they import that, upon the re-entry, the lease was wholly avoided, then it is clear the present

(*e*) 1 H. & W. 468; 5 N. & M. 14; 3 A. & E. 741.
(*f*) 1 Gale, 305; 2 C. M. & R. 547; 4 Dowl. 488; 5 Tyr. 585.
(*g*) 10 East, 73. See also *Franks* v. *Morris*, *Ib.* 81, n.

action will not lie, as there was no term of which the defendant was assignee, and no covenant upon which the plaintiff could sue. *Pennant's* case may, perhaps, be an authority to shew that the plaintiff might have maintained *debt* for use and occupation; but here, there was no privity of contract between the parties, and the privity of estate had been determined by the lessor's own act. It is said the plea is defective, in not stating a demand previous to re-entry; but no demand is stated in *Pennant's* case; and if the landlord re-enters, that is sufficient to put an end to the lease.—[*Tindal*, C. J.—You need not argue that point.]—The words of a lease are always to be taken against the grantor, and the Court will not be disinclined to enforce this rule, in a case where the party has stood upon his strict rights, and enforced a forfeiture, which is not favoured in law.

No argument was offered as to the *third* point made on behalf of the plaintiff.

TINDAL, C. J.—I think that the common and obvious construction of this clause in the lease is, that from the time of the re-entry by the lessor, the lessee or his assignee should cease to hold under the lease; or, in other words, that the lease should be void from that time; if the argument on the part of the defendant is good for the assignee, it is equally good for the lessee, and then it would amount to this, that, if the lessor had re-entered for a non-performance of any of the other covenants in the lease, as, for instance, for non-repair, and arrears of rent had been due at the time, that such arrears would have been lost to the lessor; this is certainly not the true construction of the lease.

PARK, J., and VAUGHAN, J., concurred.

BOSANQUET, J.—The right of action having vested in the lessor, by the breach of covenant, it cannot be considered as put an end to by the subsequent re-entry.

Judgment for the plaintiff.

BLISS *v.* HALE.

Jan. 17.

CASE for a nuisance. The declaration stated that the plaintiff, before and at the respective times of the committing of the several grievances by the defendant hereinafter mentioned, was, and from thence hitherto has been, and still is possessed of a certain messuage or dwelling-house and premises, and the said messuage, &c., the said plaintiff and his family, at the said several times thereinafter mentioned, occupied, inhabited and dwelt in, and still do occupy, inhabit and dwell in. And the defendant before, and at the said respective times of the committing of the said several grievances hereinafter mentioned, was and from thence hitherto has been and still is, possessed of certain messuages, houses, buildings and premises, contiguous and near to the said messuage, &c., of the plaintiff; nevertheless, the defendant well knowing the premises, but contriving, and intending to injure, prejudice and aggrieve the plaintiff and to incommode and annoy him and his family, in the possession, occupation and enjoyment of his said messuage,

User of a nuisance for less than twenty years, will not legalize it: therefore, to an action on the case for a nuisance, arising from a candle factory, it is no defence that the defendant had carried on the trade for three years before the plaintiff became possessed of his premises.

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&c., before the commencement of this suit, to wit, on, &c. and on divers other days and times, between that day and the commencement of this suit, wrongfully and injuriously exercised and carried on, in and upon the said messuages, &c., of him, the said defendant, (so being contiguous and near to the said messuage, &c., of the plaintiff as aforesaid), the trade or business of a candle-maker or manufacturer of candles, and then and there, to wit, &c., in and upon the said messuages, &c., of him, the said defendant, did wrongfully and injuriously melt and prepare and cause, &c., for the making and manufacturing of candles, divers large quantities of grease and tallow; and did then and there, to wit, on, &c., aforesaid, in and upon the said messuages, &c., of him, the said defendant, wrongfully and injuriously make and manufacture, and cause, &c., divers large quantities of candles, by means of which several premises, divers noisome, noxious and offensive vapours, fumes, smells and stenches, on the several days and times aforesaid, arose, issued and proceeded from the said messuages, &c., of the said defendant and spread and diffused themselves over and upon and into and through, and about the said messuage, &c., of the plaintiff and the air in and over, through and about, the same was thereby then greatly filled and impregnated with the said noisome, noxious and offensive vapours, &c. and was then rendered and became and was and from thence, hitherto, has been and still is greatly corrupted, offensive, disgusting, unwholesome and uncomfortable. And the said defendant also, on, &c., in and upon the said messuages, &c., of him, the said defendant, near to the said messuage, &c., of the plaintiff, wrongfully and injuriously erected, set up and placed and caused, &c., divers, to wit, four steam engines, and other machinery and divers furnaces and stoves, to wit, six furnaces, and six stoves, and the said steam engines and machinery and the said furnaces and stoves so erected, set up and placed, wrongfully and injuriously kept and continued for a long space of time, to wit, from the day and year last aforesaid hitherto, and on the said day and year last aforesaid, and on other divers days and times between that day and the commencement of this suit and in and during the night time of the said last mentioned several days, wrongfully and injuriously did make and kindle, and cause, &c., divers great fires of coals and other fuel and materials in the said furnaces and stoves and kept and continued the same so there kindled and made for divers long spaces of time, to wit, for the space of forty-eight hours, on each and every of the said last mentioned several occasions; and did also, on the several days and times last aforesaid and in and during the night time of the said last mentioned several days, wrongfully and injuriously work and use the said steam engines and machinery and set the same a-going, and caused, &c., and kept and continued the same so at work and a-going as aforesaid, for divers long spaces of times, to wit, for the space of forty-eight hours, on each and every of the said last mentioned several occasions. By means of which several last mentioned premises, divers other noxious, offensive, sulphurous and unwholesome smokes, steams, smells and vapours, and divers large quantities, as well of soot, ashes, dirt, dust, cinders and filth, as also of sparks and of flakes of fire on the several days and times last aforesaid, arose, and were produced, and emitted from the said furnaces and stoves of the defendant, and from his said messuages, &c. and the chimneys, windows, and apertures thereof, and entered into and spread and diffused themselves over and upon and into and through and about the said messuages, &c., of

the plaintiff, so that the air over and about and through the said messuage, &c., of the said plaintiff, on the several days and times last aforesaid, was and from thence hitherto has been and still is thereby greatly filled and impregnated with the said last mentioned smokes, &c., and with the said soot, &c.; and thereby, then became and was, and from thence hitherto has since, and yet is still further corrupted and rendered still more uncomfortable and unwholesome; and, thereby, also divers large quantities, as well of the said soot, &c., as also of the said sparks and flakes of fire, on the several days and times last aforesaid, fell and settled in and about the said messuages, &c., of the plaintiff, and the rooms and chambers thereof and the furniture and other goods and chattels of the plaintiff, then being in the same, and greatly dirtied, damaged, and spoiled the said messuage, &c. and the said furniture, &c., of the plaintiff therein; and also by means of the said premises on the several days and times last aforesaid, and in, and during the night time of the said last mentioned several days the walls and partitions and other parts of the said messuage, &c., of the plaintiff, became and were greatly, and alarmingly heated and in danger of taking fire, and so continued for divers long spaces of time, to wit, for the space of seventy-two hours successively, on each and every of the said last mentioned several occasions. And, also, on the several days and times last aforesaid, and in, and during the night time of the said last mentioned several days, during the natural and proper hours of rest of the said plaintiff and his family, inhabiting the said messuage, &c. of the plaintiff, divers loud jarring and annoying sounds and noises, and divers great and dangerous, and alarming shakings, concussions and vibrations of and in the said messuage, &c. of the plaintiff, were made and occasioned by and through the working and using of the said steam engines and machinery, by the said defendant as aforesaid; and the said defendant also on the several days and times aforesaid, in and by divers other ways and means, wrongfully and injuriously caused and procured divers other noxious, offensive and unwholesome vapours, &c., to arise and ascend near to, and spread and diffuse themselves in, and about the said messuage, &c., of the plaintiff, in and by divers other ways and means, wrongfully and injuriously and to a dangerous and alarming degree heated and caused and procured to be heated, the said messuage, &c., of the plaintiff, and the walls and partitions thereof; and also on the several days and times aforesaid, in and during the night time of the said several days and times, the said defendant in and by divers other ways and means, wrongfully and injuriously made, and caused and procured to be made, divers other loud and alarming sounds and noises, near to, and about the said messuage, &c., of the plaintiff, and thereby caused and produced divers other great, and annoying, and dangerous, and alarming skakings, &c., of, and in the said messuage, &c., of the plaintiff; by means of all which said several premises, the said plaintiff and his family inhabiting the said messuage, &c., of the plaintiff, on the several days and times aforesaid, and in and during the night time of the said several days, were greatly annoyed, disturbed, and harrassed, and lost and were deprived of their natural rest and sleep; and the said messuage, &c., of the plaintiff were thereby, then rendered and became, and were from thence, and hitherto have been and still are uncomfortable and wholly unfit for habitation; and the said plaintiff, thereby, during all the time aforesaid has been and still is greatly inconvenienced and an-

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noyed in the use, possession, and enjoyment of his said messuage, &c. And also by means of the premises, the said plaintiff during all the time aforesaid, has been and still is hindered and prevented from exercising and carrying on his trade and business of a brush-maker, in so beneficial and profitable a manner, as he before the committing of the said grievances by the defendant, had been used and accustomed and would, but for the committing of those grievances, have continued to do; and the said plaintiff has thereby lost, and been deprived of divers great gains and profits, which he otherwise might and would have derived and acquired from his said trade and business; and the said plaintiff has been and is by means of the premises, otherwise greatly injured and damnified, to the plaintiff's damage, &c.

Second plea.—And for a further plea in this behalf, as to the exercising and carrying on, in and upon the said messuages, &c., of him, the said defendant, (so being contiguous and near to the said messuage, &c., of the said plaintiff,) the trade or business of a candle maker, or manufacturer of candles, and as to the melting and preparing, and causing, &c., for the making and manufacturing of candles, the said large quantities of grease and tallow; and as to the making and manufacturing, and causing, &c., the said large quantities of candles; and as to the erecting, setting up and placing and causing, &c., a certain part of the said machinery and furnaces and stoves, to wit, three furnaces and three stoves, and keeping and continuing the same so erected, set up and placed, for the said space of time in the declaration mentioned, and as to the making and kindling and causing, &c., the said fires of coals and other fuel and materials in the said furnaces and stoves, and keeping and containing the same, so there kindled and made; and as to the working and using the said machinery in the plea above mentioned, and setting the same a-going, and causing, &c., and keeping and continuing the same so at work and a-going, as aforesaid; and causing and procuring the said other noxious, offensive and unwholesome vapours, &c., to arise and ascend near to and spread and diffuse themselves in and about the said messuage, &c., of the plaintiff and the walls and partitions thereof; and also as to the making and causing and procuring to be made the said other sounds and noises near to and about the said messuage, &c., of the plaintiff, and thereby causing and producing the said other shakings, &c., of and in the said messuage, &c., of the plaintiff; the said defendant says, that the plaintiff ought not to have or maintain his aforesaid action, thereof, against him; because he says, that he, *the defendant, was possessed of his said messuages, &c.*, in the declaration mentioned, for a long space of time, to wit, *for the space of three years, next before the plaintiff became possessed* of his said messuage, &c., in the declaration mentioned, and before he, the plaintiff occupied, inhabited and dwelt in the same; and that before and at the time when the defendant first became and was, possessed of his said messuage, houses, buildings and premises, the said furnaces and stoves, in the introductory part of this plea mentioned, had been, and then were, erected, set up and placed in and upon the same. And the defendant further saith, that he, the defendant, always, to wit, from the time at which he so became possessed of his said messuages, &c., as aforesaid, thence, until and at and after the plaintiff so became possessed of his said messuage, &c., as in the declaration mentioned, and with his family dwelt, occupied and inhabited as aforesaid, and thence hitherto, hath always used, exer-

cised and carried on the said trade and business of a candle-maker and manufacturer of candles, and made and manufactured candles at and in and upon the same, and during all that time hath continued to use, exercise and carry on the said trade and business of a candle-maker and manufacturer of candles, and to make and manufacture candles at, and in, and upon the said premises, and to melt and prepare, and cause, &c., for the making and manufacturing of candles, the said large quantities of grease and tallow, and hath kept and continued the said furnaces and stoves so erected, set up and placed; and hath continued to make and kindle, and cause, &c., the said great fires of coals and other fuel and materials in the said furnaces and stoves, and to keep and continue the same so there kindled and made, and to work and use the said machinery, and to set the same a-going, and to cause, &c., and to keep and continue the same so at work and a-going as aforesaid; and to cause and procure noxious, offensive and unwholesome vapours, &c., to arise and ascend near to, and to spread and diffuse themselves in, and about, the said messuage, &c., of the plaintiff, and to heat, and cause and procure to be heated the said messuage, &c., of the plaintiff, and the walls and partitions thereof; and to make, and procure to be made, sounds and noises, to and about the said messuage or dwelling house and premises of the plaintiff, and thereby cause and produce shakings, concussions and vibrations of, and in, the said messuage or dwelling house and premises of the plaintiff, in the same manner and form and degree, and to the same extent, and at the same hours and times and seasons, as at the said times when, &c., in the said declaration mentioned, and in the introductory part of this plea mentioned; and the same during all that time, and at the said times, &c., were, and still are, requisite and necessary to enable the said defendant to carry on his said trade and business, in and upon the said premises, in the same manner and form, and to the same extent, as he, the defendant, carried on the same at the time when the plaintiff came to his said premises in the said declaration mentioned, near to, and adjoining to, the premises and business of the defendant, so carried on as aforesaid; and the defendant in fact saith, that he, the defendant, lawfully enjoyed his said premises, manufactory and business before the plaintiff came to occupy, or was possessed of, his said premises in the said declaration mentioned, in the same condition, extent, manner and form as he enjoyed and possessed the same, at the said times when, &c., in the said declaration mentioned, and of right ought still lawfully to enjoy the same without interruption or suit of the said plaintiff, and this the defendant is ready to verify, wherefore he prays judgment, &c.

Demurrer.—And as to the plea of the defendant, by him secondly above pleaded, the plaintiff saith that the said second plea is not sufficient in law, and the plaintiff, according to the form of the statute in such case made and provided, states and shews to the Court here the following causes of demurrer to the said second plea, (that is to say), that the defendant in and by his said second plea, attempts to justify the committing of the grievances in the introductory part of the plea mentioned, on the ground that he was possessed of his premises on which the nuisances are carried on, for a certain space of time, (to wit), three years, before the plaintiff and his family came to live in the adjoining premises, and that during all that time, and ever since, he, the defendant, has carried on the nuisances to the same extent, and in the same manner, as

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at the said several times, when, &c.; whereas the said matters, so stated by the defendant in his said second plea, do not, in law, constitute any justification or excuse for the committing of the said grievances; and also, that the defendant, in his said second plea, claims for himself a right to continue the said nuisances, in the introductory part of that plea mentioned, without suit or interruption from the plaintiff; but the defendant in his said second plea shews no sufficient ground or foundation in law, whereon to rest the said claim of right; and if the said second plea is to be understood as claiming such right on the ground of user, or length of enjoyment, then the said second plea is bad, by reason that no length of enjoyment can confer a right to the continuance of nuisances, of the nature and description of those in the introductory part of the said second plea mentioned, the same being not only grievous and intolerable to the plaintiff individually, but amounting, in fact, to public nuisances; and even if it be granted, that any length of enjoyment can confer a right to the continuance of such nuisances, at any rate the period of enjoyment necessary for that purpose, cannot be taken at less than 20 years, and then the said plea is bad, by reason that it does not shew an uninterrupted user and enjoyment for the said period of twenty years, but merely states that the defendant carried on his noxious and offensive trade, and committed the other nuisances for three years before the time at which the plaintiff and his family came to reside in the adjoining premises, by which the defendant could not at that time have acquired any right to the continuance of the said nuisances, and it is not shown how long afterwards the plaintiff and his family lived in the said premises before the present action was commenced, or that the plaintiff acquiesced in the continuance of the said nuisances, so long as together with the foregoing period of three years, to make up the requisite length of enjoyment; but on the contrary, it is consistent with the said second plea, that the present action was brought by the plaintiff immediately after he came to live in his said premises; and so that the said noxious trade and other nuisances, instead of twenty years, have been carried on little more than three years, and that not in the time of plaintiff; or if the said second plea is to be understood as founding the defendant's claim to the uninterrupted continuance of the said nuisances, solely on the fact that the said nuisances existed and were carried on upon the defendant's premises, before and at the time the plaintiff and his family came to live in the adjoining premises, then the said second plea is bad, by reason that such fact of itself constitutes no ground or foundation in law whereon to rest such claim; and if it be granted that circumstances might exist which would render the fact of the plaintiff and his family having come to the said nuisances, when they were already existing, an answer to this action, as if the said noxious trade of the defendant had been originally set up, and the said nuisance commenced, in a place remote from human habitation, and the house occupied by the plaintiff and his family had been afterwards built in the neighbourhood of the said nuisances, still the said second plea is bad by reason that no such circumstances are therein stated or shown to have existed in the present case; but in this respect it is consistent with the said second plea, that the said obnoxious and offensive trade was set up by the defendant, and the said nuisances commenced in a populous and thickly inhabited neighbourhood, and the house of the plaintiff built adjoining to the premises of the defendant long before the latter were converted to such obnoxious and offensive uses; or if the said second plea is to be understood as

justifying the continuance of the said nuisances, on the ground that the said nuisances have been so long borne with in the neighbourhood, that the same cannot be as bad as to afford any just cause of complaint to the plaintiff, then inasmuch as the said second plea does, in that case, merely deny that the matters therein sought to be justified are to be regarded as nuisances at all, the said second plea is bad as amounting to the general issue of not guilty; and also, that the said second plea is bad for uncertainty in this, to wit, that it does not distinctly appear, nor can it be collected from the said second plea, on what ground exactly the said second plea is to be understood as founding the right therein claimed by the defendant to the continuance of the said nuisances, whether on length of enjoyment, or solely on the fact of the plaintiff having come to the said nuisances, or on the ground that the said nuisances had not been found annoying in the neighbourhood; and the said second plea is also bad for uncertainty in this, to wit, that although the said second plea states that the defendant lawfully carried on the said nuisances, before the plaintiff came to his said premises, and of right ought still to carry on the same as before, yet there is nothing whatsoever in the said second plea to shew that the said nuisances at the time the plaintiff so came to his said premises, or at any time since, or even at any time before, were lawful, as in the said second plea is alleged, and the said second plea is, in divers other respects, uncertain, insensible, informal, and insufficient.

Butt, for the demurrer, relied upon *Elliotson* v. *Feetham* (*a*), where a similar plea alleging the user by defendant for ten years, was held insufficient.

Heggins, in support of the plea, referred to *Com. Dig.* Tit. *Action upon the Case for a Nuisance* (A.); where, after stating that an action lies, "if a man erect any thing offensive too near the house of another, that it becomes useless thereby, as a swine-sty or a tallow-furnace;" it is added, "but if he be a chandler, *quære*" (*b*). The nuisance, if it be one, arises from the exercise

(*a*) 1 Hodg. 259; 2 Scott, 174; 2 Bing. N. C. 134.

(*b*) Citing 1 Rol. 88, *l.* 48; 2 Rol. 139, l. 2. The first passage (translated 1 Vin. Abr. *Actions*, (N. b.) *Nusance*, p. 555,) refers to the case of *Morley* v. *Pragnel* in K. B. 14 Car. I, (reported also Cro. Car. 510,) which was an action by an innkeeper against the defendant for erecting a furnace in a room in his house next the inn, in which he melted stinking tallow and stinking greaves, by reason of the ill smell whereof, the guests of the inn forbore to come thither; it is stated in Rolle, that "upon the evidence, it appeared that the defendant was a chandler, and he melted it for the use of his trade. But then it was proved, that *his tallow and greaves was not like the tallow and greaves of other chandlers; for this was a nuisance to the whole town*, and so presented at the Leet; and the reason of the nuisance was, *because he kept the greaves so long before he melted it, that it stank*, and had such an ill smell. *But* this question, *whether it lay against a chandler, came not in question* in the King's Bench," (sc. in motion of arrest of judgment,) "*because it did not appear in the declaration that he was a chandler.*"

In the second passage in Rolle (cited in Com. Dig. *ut supra*, and translated 16 Vin. Abr. *Nusance*, (F.) it is said "if a man makes candles in a vill, by which he causes a noisome scent to the inhabitants, yet this is not any nuisance, for the needfulness of them will dispense with the noisomeness of the smell; (car le *needfulness* de eux dispensera ove le *noisomeness del smell.*)" This doctrine is laid down under the heading, "What act or thing shall be said, a *common* nuisance;" "but the reasonableness of this opinion," (says Mr. Serjeant Hawkins) (a), seems justly

(a) 1 P. C. 694, ed Curwood

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of a legal and useful trade, which was carried on by the defendant before the plaintiff became possessed of his premises; the plaintiff therefore came to the nuisance of which he complains.

TINDAL, C. J.—It might as well be said that if, before the plaintiff became possessed of his property, over which there was a water course, the defendant had stopped the same, (which is a private nuisance, like the present), the plaintiff would not have a right of action against him. The plaintiff in this case complains of a nuisance arising to him, from the contiguity of the defendant's candle factory and steam engine; the defendant says, he carried on the business of candle maker, and used the factory and engine for three years before the plaintiff came into possession of his house; this is clearly no answer in law; when the plaintiff came into possession, he had all the rights that were necessary to the enjoyment of his property. The present case is governed by *Elliotson* v. *Feetham*.

to be questionable, because whatever necessity there may be that candles be made, it cannot be pretended to be necessary to make them in a town; and surely the trade of a brewer is as necessary as that of a chandler; and yet it seems to be agreed, that a brewhouse erected in such an inconvenient place, wherein the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance (b); and so in the like case may be a glass-house (c), or swine yard" (d). In *Jones* v. *Powell* (e) *Dodderidge*, J. says "*If a chandler erects a melting-house, it is a common nuisance;*" but his Lordship quaintly adds, "if a man is so tender nosed (si homo est cy *tender nosed,*) that he cannot endure sea-coal, he ought to let his house" (f). See *Matthews* v. *Cary* (g) which was an action of trespass, for breaking and entering and taking goods; the defendant pleaded that the plaintiff (being a tallow chandler) was presented at a Court Leet for a nuisance in melting tallow to the annoyance of the neighbours, and amerced therefore, and justified the distress in respect thereof; the plaintiff replied *de injuriâ, &c., absque hoc* that he did melt tallow to the annoyance of the neighbours. The point decided in this case was, that the plea was bad, because it did not set forth a warrant from the Lord of the Leet; but no objection was taken on the part of the plaintiff, that the exercise of his trade as a tallow chandler did not subject him to the penalties of a nuisance. See also *R.* v. *White* (h). In *R.* v. *Morris* (i), *Twisden*, J. "held *lawful and necessary trades must be in convenient places,*" and he mentioned a case where a new house in *Whitefriars* had been adjudged a nuisance to *Serjeant's Inn*, (Fleet Street,) and pulled down, "but was rebuilt by the countenance of the long Parliament." In the report in Ventris, *(ut infra)* it is said "the other parties doubted this position, and agreed that it was *unlawful only to erect such things near the King's Palace;*" probably referring to the case mentioned by *Dodderidge*, J. in *Jones* v. *Powell* (k), where he says "and yet as the quality of the person may be, an action may lie where it would not be allowed otherwise; and such were the cases of indictments for erecting brew-houses near to Whitehall, where the king inhabited, though they were half a mile distant."

(b) See *R.* v. *Morris*, *infra*. That an *action* lies for such nuisance, see *Jones* v. *Powell*, Hutt. 145; Palm. 136, cited Com. Dig. *ut supra*; but see *Ib.* (C.) *contra*.

(c) *R.* v. *Brookes*, Tremaine, P. C. 195; see *R.* v. *Morris*, 2 Keb. 500; *R.* & *Reg.* v. *Wilcox*, 2 Salk. 457.

(d) As to an *action*, see *Aldred's* Case, 9 Rep. 59, a.

(e) Palm. 536.

(f) *Ib.* 538.

(g) 3 Mod. 137; 1 Show. 66; Carth. 73; 1 Salk. 107; 3 *Ib.* 52; Holt, 408; Comb. 76.

(h) 1 Burr. 333.

(i) 2 Keb. 500, S. C.; *Anon.* 1 Vent. 26.

(k) Palm. 538.

PARK, J.—In that case my Lord Chief Justice correctly laid down the law, he says, "when a man purchases a lease, he takes it with all the rights incident to it. Twenty years would legalize the nuisance (*c*)."

VAUGHAN, J.—A trade of this sort may be a nuisance or not, according to the place where it is carried on; and there may be a proper defence to such an action under certain circumstances; but the defence set up on the present occasion is of no avail

BOSANQUET, J.—The defendant has undoubtedly a right to enjoy his own property; but by the well known maxim of law he ought so to use it as not to injure that of others.

Judgment for the plaintiff.

(*c*) 2 Scott, 177.

CHAPMAN *v.* BLUCK.

Jan. 17.

THIS was an action in replevin, tried at the *Summer* Assizes for the county of *Suffolk*, in 1836, before the Lord Chief Justice of this Court; the defendant avowed for a distress for three quarters' rent, due on the 24th day of *June*, 1834. The plaintiff pleaded, first, *non tenuit*, and secondly, *riens in arrere*.

At the trial, a verdict was taken by consent for the plaintiff: damages, 4*l.* 4*s.*, subject to a case for the opinion of this Court. It was admitted, that the rent claimed by the defendant, was due; and that the value of the goods distrained, exceeded the amount of the rent claimed.

The evidence was entirely documentary, consisting of papers and letters, of which the following are copies or extracts, relating to the matter in dispute.

"To *Thos. H. Bluck*, Esq.

"*Rickinghall, Feb.* 21, 1834.

"SIR—You having this day agreed to let; I beg to say that I will take *Suggenhall* farm for 100*l.* the first year, and after for 110*l. per annum*, payable quarterly; the rent to commence from *Michaelmas* last, and to be free of all deductions whatsoever; and as to the buildings, I will do all the carting of materials, and you to build up the barns; but the outlay not to exceed 250*l.* And I will engage to take it in the usual way, to be valued by two persons, one to be named by you, and one by myself; and to pay you the amount of such valuation, on my taking possession. And further, that I will take a lease of twenty-one years, at my expense; the original lease to remain with your solicitor, and he furnish both parties with a copy, to contain the usual

1. A demise may be created by a series of letters; and if the first of such series be properly stamped as a lease, it will be sufficient.

2. In a question whether an instrument shall be considered as a lease, or only as an agreement for a lease, it is *established*, that the intention of the parties is the proper test of construction; and such intention may be gathered not only from the terms of the instrument itself, but also from the concurrent or subsequent acts of the parties.

3. *A.* by letter proposed to take certain premises of *B.* at a certain rent, and for a certain term, possession to be given upon the payment of a sum to be ascertained by valuation, and he referred to a third party as to his responsibility. *B.*, having accepted such terms, and expressed his satisfaction as to the result of the reference; by a subsequent agreement between the parties, *A.*, upon payment of a different sum from that originally proposed, was let into possession. The rent not having been paid, *B.* distrained; whereupon, *A.* sued in replevin, a subsequent distress by *B.* was expressly acquiesced in by *A.*:—*Held*, that all these circumstances established that *A.* held under *B.* as tenant: and *semble*, that such tenancy was sufficiently established by the original proposal of *A.* when accepted by *B.*

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covenants, and to be farmed on the four course system, and in the best manner. And the whole subject to your being satisfied as to my responsibility, to ascertain which, I beg to refer you to *Daniel Rush Meadows*, Esq., of *Willesham*, near *Ipswich*. I am, Sir,

" *Framsden*, near *Debenham*, *Suffolk*. " *John Chapman*.

" *Thos. H. Bluck*,

" *Limehouse*, *Middlesex*."

" To Mr. *John Chapman*, *Framsden*, near *Debenham*, *Suffolk*.

" *Limehouse*, 25th *Feb.*, 1834.

" SIR—Mr. *Meadow's* letter, though dated the 22d, did not reach me till this morning, and as it is satisfactory, I hereby engage to accept of you as my tenant, agreeably to the terms of yours of the 21st instant. As the season is advancing, you may at once begin ploughing. If you will let me know what day will suit your relation to value, I will on receipt of it, write to Messrs. *Biddell* and *Blencowe*, on my part. Will *Monday* next suit, or *Saturday?* Perhaps you will let Mr. *Biddell* value for both parties.

" I am, Sir, your most obedient servant,

" *Thomas Henry Bluck*."

" To Mr. *John Chapman*, *Framsden*.

" SIR—I have just received a letter from yourself, and another from Mr. *Chapman*, of *Stowmarket*, and have written to him a letter, of which I send you below a copy. I fear the time is getting on, and cannot be recovered, which will prove very injurious to the farm, and consequently to yourself in your future operations. However, to give you every facility, I have suggested, on your remitting me 100*l.*, you shall have immediate possession, as you will perceive in the accompanying letter. I will write to you on the subject of bricks, when the first part of this business is settled; I will at the same time send you the draft lease. I am, Sir, your most obedient servant.

" *Limehouse*, *March* 14, 1834." " *Thos. H. Bluck*."

" To Mr. *Wm. Chapman* (*a*), Appraiser, &c., *Stowmarket*.

" SIR—I really regret the delay that is taking place, which must be in the highest degree prejudicial to the farm, and to Mr. *John Chapman*, since he ought to have been now for some time very busy at work. * * * * * As it is of the first importance that Mr. *Chapman* should get to work in the farm without further delay, I will let him into possession, on his remitting me 100*l.* on account; the banker stating at the same time what sum is deposited with him, on account of this business, and you engaging to bring it to a close in the shortest possible time.

" Perhaps you are not aware, that there is a sort of agreement signed by Mr. *Chapman*, and the acceptance of it signed by myself, which is to form the basis of his lease; the draft of which is only delayed being handed to him until this preliminary step is completed. * * * * I am sir, yours,

" *Limehouse*, *March* 4, 1834." " *T. H. B.*"

(*a*) The valuer appointed by the plaintiff.

"To Mr. *John Chapman, Framsden, Suffolk.*

"SIR—I am in receipt of your letter of the 17th, and not doubting that I shall find the 100*l.* perfectly correct when I go to town, I hasten to reply by this post, calculating also, that you will lose no time in getting the valuation completed, notwithstanding possession is given you. I am, Sir, your most obedient servant,

"*Limehouse, March* 18, 1834." "*Thos. H. Bluck.*"

"To Mr. *John Greengrass.*

"SIR—You will please to give possession to Mr. *Chapman*, of *Suggenhall* farm, by delivering to him all the keys. I am, Sir, yours,

"*Limehouse, March* 18, 1834." "*Thos. Henry Bluck.*"

"To Mr. *John Chapman.* "*Limehouse, April* 4, 1834.

"SIR—I am somewhat surprised, that the valuation is not even yet completed; however, I have sent you the draft of your lease, which, as soon as returned, shall be engrossed and completed. You can return it as soon as possible. I am, Sir, your most obedient,

"*Thos. Henry Bluck.*"

"To Mr. *John Chapman, Suggenhall Farm*, &c.

"SIR—In reply to your long letter, I have only to say, that if you still delay closing the business of the valuation, there can be no reason why you should withhold the rent also. At any rate, I beg to apprize you that I shall insist on its immediate payment. You will please to take notice, that the crops also are not yours, until regularly made over to you.

I am, Sir, your most obedient servant,

"*Limehouse, July* 19, 1834." "*Thos. H. Bluck.*"

On the 19th of *August* the distress was made, and the plaintiff having replevied, and declared in replevin on the 5th of the following *November*, the defendant filed his avowry on the 25th of the same month, and the following correspondence afterwards passed between the plaintiff and the defendant.

"To *Thos. H. Bluck*, Esq.

"SIR—I hereby consent to pay my rent up to *Michaelmas*, 1834, being four quarters, on or before the 16th of *February* next; and I will pay 135*l.* for the valuation, 100*l.* of which you have already received, and the other 35*l.* to be paid in a fortnight, or with the rent; and if the original agreement signed by me on the 21st of *February*, 1834, says that the rent is to be "free of all deductions," I will consent to the lease being drawn according to the draft, which I will return you as early as possible.

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And I must beg that you will allow me out of the 135*l.*, 10*l.*, on account of the badness of the season, and that all law proceedings shall cease between us from this day. I am, Sir, yours,

"*Rickinghall, January* 19th, 1835." "*John Chapman.*"

"To Mr. *Chapman, Rickinghall.*

"SIR—I consent that all proceedings shall be stayed from this time, that you shall have the lease conformably to the draft you hold; and I will shew you the original agreement, with the words that the rent is to be free of all deductions; that the amount of valuation to receive is 35*l.*, and I will allow you therefrom 10*l.* for bad seasons, &c. I am, Sir, yours,

"*Rickinghall, January* 19, 1835. "*Thos. H. Bluck.*

"Witness, *J. B. Vincent.*"

"*Rickinghall, August* 7, 1835.

"SIR—I am in receipt of yours of the 5th instant, and beg to reply, that as soon as I can get my harvest in, I will pay Mr. *Bluck* the balance due, and a portion of rent, as I have got some very good crops this year, which will enable me to do so. I am very much obliged and also thankful to that gentleman for his indulgence; and as the harvest is so very near, I hope he will give me time to get it ready for market, so as to pay him, which I assure you is my intention, and always was. * * * Under these circumstances, Sir, I hope Mr. *Bluck* and you will give me a little time more. * * * And remain, Sir, your most obedient,

"To *T. Gwynne*, Esq. "*John Chapman.*"

A distress having been made for the rent due from *Midsummer*, 1834, to *Midsummer*, 1835. The plaintiff signed the following authority to the defendant's bailiff:—

"In the matter of distress for rent, due from *John Chapman*, to *Thos. H. Bluck*, Esq.

"To Mr. *Wm. Chenery.*

"I hereby direct and consent to your distraining upon the messuage, farm, and premises, situate in *Rickinghill Superior*, or near there, belonging to the said *Thomas Henry Bluck*, Esq., now in my occupation, all and every the cattle, growing crops, goods and other effects, now upon the said premises, for the sum of one hundred and seven pounds and ten shillings, being four quarters' rent due to the said *Thomas Henry Bluck*, Esq., at *Midsummer* day last.

"Dated the 11th day of *August*, 1835."

The question for the opinion of the Court was, whether, under the circumstances above stated, the defendant was entitled to distrain for the arrears of rent mentioned in the pleadings. If the Court should be of opinion that he was then the verdict for the plaintiff was to be set aside, and entered for the

defendant, for the amount of the rent in arrear; otherwise the verdict taken for the plaintiff was to stand.

Palmer, for the plaintiff. The documents above referred to, did not constitute any lease, or convey any interest, or estate to the plaintiff; the defendant therefore was not entitled to distrain. In order that an instrument should amount to a demise, it is necessary that the terms should be apparent upon the face of it, and even though it should contain words of present demise, yet if the intention of the parties is evident, that something else is to be done before the demise is to take effect, it will operate as an agreement for a lease only, *John* v. *Jenkins* (*b*). Now here, the only document that it can be pretended would amount to a demise, is the letter of the 21st of *February*, 1834. But if that document be taken alone, it clearly does not amount to a lease, as something more remains to be done; first, the landlord is to be satisfied as to the plaintiff's responsibility:—[*Tindal*, C. J.—If the landlord, after making enquiries, declares he is satisfied, does not this operate so as to make it a valid demise from the beginning?]—A lease cannot be constituted by two separate writings; this is not like the counterpart of a lease:—[*Tindal*, C. J.—One letter contains an offer; the other, the acceptance of such offer. Do they not both constitute only one instrument?—*Bosanquet*, J.—Suppose they were two writings on the same sheet of paper.]—That would probably be considered sufficient to make them one instrument.]—[*Bosanquet*, J.—What if they were two separate writings wafered together?]—If that were done at the same time they were written, it would probably have the same effect: but if these two letters, of the 21st and 25th of *February*, are to be considered as making one instrument of demise, how are they to be stamped? the first might have an *ad valorem* stamp, but what stamp would be affixed to the second? It could not be received in evidence without a stamp, upon the same principle that an indorsement made upon a deed must be stamped (*c*). Assuming then that these two letters do not constitute one instrument of demise, it is clear that the mere fact of the plaintiff's having been let into possession, will not give him an estate under an implied demise, and unless there is a demise, the landlord has no right of distress, but must resort to his action for use and occupation, *Hegan* v. *Johnson* (*d*); *Dunk* v. *Hunter* (*e*). Then as to the supposed acceptance by the defendant of the plaintiff's terms; the former does not say that the plaintiff may at once take possession; all he says is that he engages to accept the plaintiff as his tenant, and he adds, "as the season is advancing, you may at once begin ploughing;" a permission which would have been quite superfluous if the plaintiff had already taken an estate, or was intended to take one by virtue of that acceptance of his offer; it is obvious, he was only to enter for that specific purpose. So in the letter of the 14th of *March*, the defendant writes, "on your remitting me 100*l*, you shall have immediate possession;" this again is prospective and shews that no demise had then taken place.—[*Vaughan*, J.—What do you say to the letter of the 19th of *January*, 1835, in which the plaintiff says, "I hereby agree to pay my rent up to *Michaelmas*, 1834?"]—That was

(*b*) 1 C. & M. 227; 3 Tyr. 170.
(*c*) See *Schumann* v. *Weatherhead*, 1 Esp. 537.
(*d*) 2 Taunt. 148.
(*e*) 5 B. & A. 322.

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after the distress, which is the ground work of this action, and which took place in the preceding *August:* that letter might give the landlord an action for use and occupation, but it could not legalize a distress, if there were no previously existing demise: the question here is, what were the rights of the parties at the time the distress was made. The plaintiff was not even let into possession under the terms of the original agreement, by which he was to pay the amount of the valuation on his taking possession; for possession was given to him upon a sort of compromise, namely, upon payment of 100*l.* The defendant, in more than one of his letters, speaks of the existence of an "*agreement*" or, "*a sort of agreement*" between the plaintiff and himself, and talks of the delay in preparing the "draft lease," which shows he did not consider, that there was any existing demise. It is admitted, that where there are words of present demise in an instrument, although it be in the form of an agreement, such words will enure as a lease, if it were the intention of the parties, as declared by the instrument, that such should be its effect, *Poole* v. *Bentley* (*f*); but, on the other hand, although such words may be used, if, in the same instrument, there is a condition which shows that it could not have been the intention of the parties, that the demise should take effect presently, then such instrument will be considered merely as an agreement for a future lease; the cases on this subject are collected in *Chambers*, on *Landlord and Tenant*, 265. In *Morgan* v. *Blissell* (*g*), the law is thus laid down by *Mansfield*, C. J. "When the party enters into that, which on the face of it appears to be an agreement, though there are words of present demise, yet, if you collect, on the face of the instrument, the intent of the parties to give a future lease, it shall be an agreement only." The present case falls precisely within the scope of that doctrine (*h*).

Gunning, contrà.—The defendant had a clear right to make the distress in question. The plaintiff was in possession of the premises before the distress, upon the terms previously arranged between the parties. The letter of the 21st of *February*, amounted to an instrument of present demise; all requisite matters, such as the terms, the rent, &c., were fixed by that instrument, and the contract was subject to a condition only, as to the referee's answer respecting the plaintiff. In *Doe*, dem. *Pearson* v. *Ries* (*i*), where the question was, whether an agreement amounted to a present demise, the general rule is thus laid down by *Tindal*, C. J.; "The leading principle which has for a long period been established is, that the words of the instrument are to be looked at, to enable the Court to ascertain what was the paramount intention of the parties; and if the language be doubtful or ambiguous, we may call in aid acts done by the parties at the time of entering into the contract, to evidence their intention" (*j*); and his Lordship further says, "we can have no better guide to lead us to the conclusion, that it was intended to pass an immediate interest, than the act of the lessors, in putting into possession a man whom they might afterwards be compelled to turn out by an ejectment" (*k*). So in *Han-*

(*f*) 12 East, 168; 2 Camp. 286.
(*g*) 3 Taunt. 65.
(*h*) See all the cases, where such an agreement has been held to be executory merely, collected in the argument of Mr. Serjeant *Jones* in *Pinero* v. *Judson*, 3 M. & P. 497; 6 Bing. 206.
(*i*) 1 Mo. & S. 259; 8 Bing. 178.
(*j*) 1 Mo. & S. 264.
(*k*) *It.* 266.

cock v. *Caffyn* (*l*), where a similar question arose, *Park*, J., said, "The agreement in question is not strictly an executory contract, it is enough, however, to say, that the defendant has himself put a construction upon it, to conclude himself, by distraining." In that case, the defendant was seeking to treat the agreement as executory; and, therefore, the argument of the learned judge, undoubtedly applied with greater force against him; but in this case, the authority given by the plaintiff, to make the second distress, which included the residue of the year for which the distress in question was made, is conclusive against him. In *Roe*, dem. *Jackson* v. *Ashburner* (*m*), *Ashurst*, J., thus lays down the general rule on this subject, "I entirely agree to the position, that whether an agreement of this kind, shall or shall not be considered as a lease, ought to depend on the intention of the parties, which must be collected from the words of the agreement, *and from collateral circumstances*. Where the words are *de præsenti*, 'I demise, &c.,' or an agreement, that 'the party shall hold and enjoy,' and the party is immediately put in possession, the landlord shall not afterwards turn him out of possession, and say, that it was not a present demise; *for the permitting the party to enter, is strong evidence to show, that the landlord intended to give a present interest;* but where the words themselves do not necessarily imply it, and where possession is not given, and there is no other act to manifest such an intention, then it is merely an executory contract" (*n*). Now, applying that rule to this case, (for, of course it is as applicable in favour of a landlord, as it is against him,) it is decisive of the present question. Here are words of present demise, and here the plaintiff is put into possession immediately that he has complied with the terms of the agreement, and long before the distress was made. In *Harrington* v. *Wise* (*o*), the words, "doth let," were held a present demise, although there was a further covenant, that a lease should be executed between the parties, on a future day; there are several old cases to the same effect, collected in *Com. Dig.* Tit. *Estates*, (G. 1.) and a string of modern decisions has recognised and established the rule as laid down by *Ashurst*, J., in *Roe* v. *Ashburner*; *Barry* v. *Nugent* (*p*). *Pinero* v. *Judson* (*q*), *Wilson* v. *Chisholm* (*r*), *Mann* v. *Lovejoy* (*s*), *Warman* v. *Faithful* (*t*). The case of *Poole* v. *Bentley* (*u*), has frequently been acknowledged by judicial authority, as a leading decision upon this subject, and is strongly in favour of the defendant. There is an obvious distinction between the present case, and those cited on behalf of the plaintiff. In *Morgan*, d. *Dowding* v. *Bissell* (*v*), very great difficulties and inconvenience would have arisen from the construction of the instrument as a lease; it contained a stipulation, that out of the rent mentioned, a "proportionate abatement" should be made, in respect of certain excepted premises, and until that was apportioned, the lessor could not distrain; and also a stipulation, that the tenant should hold under all usual covenants "in that part of the country," which left it open to dispute what those usual covenants were; and these circumstances were considered by the Court, as an indication of the intention of the parties, that it should be an agreement only. So in *Dunk* v. *Hunter* (*w*), the ground of the decision, as stated by *Abbott*, C. J., was, that there was

(*l*) 1 Mo. & S. 521; 8 Bing. 358.
(*m*) 5 T. R. 163.
(*n*) *Ib.* 168.
(*o*) Cro. El. 486; Noy, 57; Moore, 459; 1 Roll. Abr. 847.
(*p*) Cited 5 T. R. 165, and reported 3 Doug. 379.
(*q*) 6 Bing. 206; 3 M. & P. 497.
(*r*) 4 C. & P. 474.
(*s*) R. & M. 355.
(*t*) 5 B. & Ad. 1042; 3 N. & M. 137.
(*u*) 12 East, 168; 2 Camp. 286.
(*v*) 3 Taunt. 65.
(*w*) 5 B. & A. 322.

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nothing certain and fixed in the agreement; his Lordship said, "looking at this instrument, I cannot infer when the tenancy was to commence, or the rent to become due. *The whole is left in doubt*" (*x*). Such, as has already been shewn, is not the case here. So in *John* v. *Jenkins* (*y*), the rent had not been ascertained. With regard to the stamp, the second letter did not require one; it was sufficient that the first should have the proper *ad valorem* stamp as a lease, and that stamp it bears. It has been said, that the condition in the instrument of the 21st of *February*, as to the reference to Mr. *Meadows*, would prevent it from operating as a present demise; but upon the performance of such condition, that is upon the referee's giving an answer which was satisfactory to the defendant, (which he did, long before the distress,) the agreement became absolute; upon the same principle, that a service for a year under a conditional hiring, has been held to confer a settlement, *Rex* v. *The Inhabitants of Byker* (*z*); *Rex* v. *Farleigh Wallop* (*a*). If, however, there were any ambiguity in the terms of the instrument itself, the *subsequent acts and correspondence of the parties*, would leave no doubt as to their original intention that the plaintiff should take possession, as tenant to the defendant, at a rent fixed and certain, and entirely independent of any lease, which was only to be for the greater security of the party.

Palmer, in reply, contended that, at any rate, the subsequent acts of the parties, could not be referred to, as evidencing their intentions upon a previous transaction; he also urged that there was no day shewn in the document, said to be a lease, when the plaintiff was to have possession under the agreement; and that this was a vice which was fatal to the construction contended for.

TINDAL, C. J.—It is certainly difficult to reconcile all the cases as to whether an instrument shall amount to a present demise, or merely an agreement for a lease; upon the best consideration however, which I have been able to give to the circumstances of this case, I am of opinion that they amount to an actual demise, conveying the legal interest from the defendant to the plaintiff. The question is, whether upon the 19th of *August*, when the distress was made, the plaintiff was tenant to the defendant; that is the precise point in this case. Now it appears, looking at the letters, that this case falls within the class of decisions in which it has been laid down, that where there are words of present demise in an instrument, and it is the obvious intention of the parties that possession of the premises should be given, such instrument will enure as a lease, even though it should contain an agreement that a formal lease should be executed at a future time. Now I think the intention of these parties is sufficiently manifest, from the terms of the letters of the 21st and 25th of *February*, 1834: in the first of these, the plaintiff states that the defendant *having agreed to let*, he, the plaintiff, will take the farm at a certain fixed *rent*, to commence from *Michaelmas* last; then there are certain stipulations as to building and valuation, the amount of which the plaintiff is to pay on his taking possession; and then he goes on to say, "and further, I *will*

(*x*) 5 B. & A. 325.
(*y*) 1 C. & M. 227; 3 Tyr. 170.
(*z*) 2 B. & C. 114; 3 D. & R. 330.
(*a*) 1 B. & Ad. 336. See also *Rex* v. *Atherton*, Burr. Set. Ca. 203; *Rex* v. *St. Ebbs*, *Ib.* 289; *Rex* v. *Lidney*, *Ib.* 1; S. C. 2 Stra. 950; *Rex* v. *New Windsor*, Burr. Set. Ca. 19.

take a lease of twenty-one years at my expense, the original lease to remain with your solicitor, and he to furnish both parties with a copy, to contain the usual covenants." If the case had rested upon this alone, and upon the fact of the plaintiff's having been let into possession, I think it would have amounted to a sufficient letting and taking from *Michaelmas*, 1833. It appears to me, that the stipulation for the drawing up of a lease looks more like a provision for the security of both parties, than as pointing out an intention of creating a future demise. The letter then concludes with a reference to a third party, as to the plaintiff's responsibility. On the 25th of the same month, the defendant answers this letter, and states he is satisfied with the result of the reference, and engages to accept the plaintiff as his tenant, agreeably to the terms of his letter of the 21st; and he adds, "as the season is advancing, you may at once begin ploughing." The first objection that has been taken on the part of the plaintiff is, that there is no instance where a demise has been created by two separate instruments; and it is contended, that a demise must be by one single instrument. No authority, however, is cited in support of this proposition; and if it were correct, it would have the effect of preventing many agreements for leases from operating as demises, which would, nevertheless, be valid as agreements; inasmuch as it is clear, that an agreement may be constituted by letters; but I am of opinion, that the proposition is not correct; and that where, as in this case, a party proposes by letter, to take a lease on certain terms, to which the landlord assents, such first letter is capable of becoming a lease. But then it is said, that here there is a condition annexed to the agreement, namely, that the plaintiff is not to enter till after payment of the amount of the valuation, and therefore, that there could not have been a present demise: this, I think, would have been a serious objection, if there had been neither a performance of the condition, nor a waiver of it; but the moment the condition is either performed or waived, the agreement becomes absolute. Now what is the case here? The defendant, on the 14th of *March*, writes to the plaintiff, that as the valuation may take some time, upon his remitting 100*l.* he may at once enter into possession; this, therefore, amounts to a waiver of the original condition, or rather a substitution of another, upon the performance of which, the plaintiff is let into possession. Under what then is possession given? It seems to me clear, that it is under the demise constituted by the original agreement. We are further at liberty to look at the acts of the parties, to assist us in the construction of the agreement (*b*). The distress was put in, in *August*, 1834, and on the 19th of the following *January*, we find the plaintiff writing thus:—"I hereby consent to pay my rent up to *Michaelmas*, 1834;" the effect of this is clearly to acknowledge the existence of a tenancy; the very word "rent," raises the strongest inference against the plaintiff; for *rent* can only arise from the legal relation of landlord and tenant, as otherwise there would only be a sum of money due in respect of the use and occupation of the premises. Then a second distress having been put in, the plaintiff in *August*, 1835, writes to the defendant's bailiff—"I hereby direct and consent to your distraining upon the messuage, &c., for the sum of 107*l.* 10*s.*, being four quarters' *rent* due to *Thomas Henry Bluck*, Esq., at *Midsummer* day last." The plaintiff therefore, has throughout put his own construction upon the agreement, that he was holding as a

(*b*) In *Iggulden* v. *May*, 9 Ves. 325; *Bldon*, C. held that the construction of a covenant for perpetual renewal was not affected by the acts of the parties.

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Best, C. J., thus expounds the rule:—"The only principle applicable to cases of this kind is, that if, in the instrument relied on, there is that which, in point of law, will satisfy the word *lease*, then it will operate as a lease, unless it was the intention of the parties that another instrument should be executed. No particular form of words is necessary. All that is required is, that the premises to be let should be mentioned, and the rent to be paid, and that the commencement and expiration of the term should also appear; and if there be any uncertainty in any of these particulars, then the instrument will not be a lease. But if we can find all these particulars set out, then it will be a lease, if the parties intended that it should be. See also *Hayward* v. *Haswell*, 2 N. & P. 411; *Perring* v. *Brook*, 7 C. & P. 360.

Jan. 18.

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1. A sheriff's *warrant* (upon a *fi. fa.*) in the ordinary form, was delivered to *F. S.* who was the regularly appointed bailiff of the lord of a liberty within the county. The writ was executed by him within such liberty. Subsequently, a *mandate* (upon another *fi. fa.* at the suit of another plaintiff against the same defendant) directed to the lord of the liberty, was also delivered to *F. S.* and executed by him. The defendant having become bankrupt, the assignees applied to have the proceeds of the two levies paid over to them. *F. S.*, under the direction of the legal adviser of his principal, paid over the proceeds accordingly, the assignees giving an indemnity to the latter; a rule having been obtained against the lord to return the *mandate* in the first action:—*Held*, the lord was precluded from denying that no *mandate* had been delivered to him.

2. Where affidavits refer to certain documents, the Court will, if necessary, inspect the originals.

THE plaintiff, an attorney, having recovered judgment against the defendant, issued a writ of *fieri facias*, directed to the sheriff of *Northamptonshire*: the plaintiff himself delivered a *warrant* in the ordinary form to one *Francis Seaton*, to execute such writ; the warrant being directed from the sheriff "to *Francis Seaton*, and *Job Doe*, *my bailiffs*, &c.," and not containing a "*non omittas*" clause. *Seaton* was regularly employed as the deputy for the Marquis of *Exeter*, the bailiff of the liberty of the hundred of *Nassaburgh*, in the same county; and he was also occasionally employed by the sheriff to execute writs within his bailiwick. *Seaton* executed the above warrant upon the defendant's goods, situate within the said liberty. Another writ of *fieri facias* having been issued by a different plaintiff against the defendant, the sheriff in that case delivered a *mandate* in the regular form to *Seaton*, directed "to the bailiff of the liberty, &c.;" this mandate also was executed by *Seaton*; and the goods levied under both executions were sold by him. A *fiat* of bankruptcy having issued against the defendant, and *Seaton* having been served with notice thereof, he applied to the steward and attorney for the Marquis of *Exeter*, as to the course he should adopt; who having taken an indemnity from the assignees, directed *Seaton* to pay over the proceeds of the two levies to the assignees. The sheriff having been ruled to return the writ in this action, returned *mandavi ballivo qui nullum*, &c. The plaintiff thereupon obtained a rule calling upon the Marquis of *Exeter*, as such bailiff, to return the said mandate.

Wilde, Serjeant, had obtained a rule *nisi*, calling upon the plaintiff to shew cause why the above-mentioned rule should not be discharged;

Bompas, Serjeant, and *Butt*, now shewed cause.—First, there is no substantial difference between a *mandate* and a *warrant*; the document in question, was undoubtedly, in form, an ordinary sheriff's warrant, but that is immaterial, as it had been served upon the deputy of the chief bailiff, and acted upon by him. It is clear, that if a *non omittas* clause had been inserted in the writ, the sheriff might have given authority to any of his own officers to enter the liberty, and execute such writ within it, without any mandate hav-

ing been previously issued to the bailiff, *Carrett* v. *Smallpage* (*a*). It is admitted, that if the sheriff execute a writ within a liberty, such writ *not* having the *non omittas* clause inserted, he would be liable to the *lord of the liberty* in damages, but *the party* would have no right to complain; *Fitzpatrick* v. *Kelly* (*b*); *Sparks* v. *Spink* (*c*); *Piggott* v. *Wilks* (*d*). The lord of the franchise in this instance, having, by his deputy, executed the writ, he is now concluded from disputing its accuracy. The bailiff of a liberty, is considered in law, as the servant of the sheriff; he has a prescriptive right to execute writs within the liberty, but a writ issues, in the first instance directed to the sheriff, who in his turn issues his mandate to the bailiff. *Dalton*, in his *Office of Sheriffs*, says, "As the sheriff is the immediate officer of the King and his Courts, to execute all writs and process, so to him all their writs shall be directed, although it be a matter or thing done within a liberty or franchise; in which case, the sheriff must write or send his *precept* to the bayliff of the liberty, who must serve and execute the same, (as servant to the sheriff), and must make answer (or return) thereof to the sheriff; but the sheriff himself must make the return of the writ into the Court" (*e*). The document directed to the bailiff of a liberty has been called a *mandate*, from the words of the commencement of the sheriff's return, *mandavi ballivo*, &c.; in the passage above cited, *Dalton* calls it a *precept* (*f*); and by whatever name it may be called, if the sheriff and the bailiff both understand it to be a *mandate*, and the latter execute it accordingly, he cannot afterwards say it is no mandate; it is not necessary that it should be in any particular form.—[*Tindal*, C. J.—This does not appear to have been directed to the chief bailiff; is a mere delivery to the deputy bailiff sufficient?]—The bailiff might have refused to execute, but having executed, he has recognized the efficacy of the mandate: nor was it necessary that it should be directed to the special bailiff, or lord of the franchise, *Newland* v. *Cliffe* (*g*); in the argument in that case, it was stated that the same nobleman who has the franchise, now under consideration, is also lord of the shire of *Peterborough*, in the same county, and that the mandates and precepts are directed to, and returned by, the bailiff, and not the Marquis (*h*). All the lord has a right to require is, that he should have the execution of the writs, which he has had in this case.—[*Tindal*, C. J.—The case just cited was decided upon its own peculiar circumstances; the grant, in that case, to the lord of the franchise, was, that he and his assignees *by his or their bailiff or bailiffs*, for that purpose deputed," should have the return of writs, &c., and that no sheriff should enter, "*unless through default of the bailiff or bailiffs*," of the lord; and Lord *Tenterden*, in giving the judgment of the Court, expressed his opinion, that if there had been no such special provision and exception, the grantee would have been bound to make the return either by himself or by his officer, in the name of the grantee. I had certainly always understood, that in the absence of any such peculiar circumstances, the writ ought to be directed to the

(*a*) 9 East, 330.
(*b*) Cited 3 T. R. 740; reported 3 Doug. 30.
(*c*) 7 Taunt. 311.
(*d*) 3 B. & A. 502.
(*e*) Ch. 39, p. 181, ed. 1700; citing 2 H. 6, 7. Finch, 52.
(*f*) In a subsequent passage, in the same chapter, he says, "For the forms of the sheriff's *precepts*, or *warrants*, to be made to the bayliff of the liberty, they are to be like to those which are made by the sheriff to his other bayliffs, saving that, where these are directed *Ballivo hundred de R.* &c., these are directed *Ballivo libertatis de R.* &c."
(*g*) 3 B. & A. 630.
(*h*) *Ib.* 633.

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special bailiff of the liberty. It appears to have been so in *Boothman* v. *the Earl of Surrey* (*i*).] The sheriff has, in this instance, made his return in the following manner: "I made my mandate to *F. Seaton*, bailiff of the hundred, &c., which said bailiff has the execution of all writs in such hundred, &c." It may, therefore, be presumed, that the direction and delivery to him were proper. In *Com. Dig.* Tit. *Officer*, (D. 5,) it is said, "An act by a deputy, in his own name, will be good, except in special cases;" and 1 *Salk.* 96, is referred to (*j*). If then a deputy is called upon to do a particular act *as deputy*, and the parties so treat him, the fact of his having acted in that capacity, cannot afterwards be denied.

But, *secondly*, there has, in this case been, on the part of the Marquis of *Exeter*, through the agency of his steward and attorney, an express *recognition* of *Seaton's* acts; and consequently, of the authority under which he acted by their directions, the proceeds of the levy were paid over to the defendant's assignees, upon their giving an indemnity to the Marquis; whatever, therefore, the form of the document may have been, he has distinctly recognised it as an authoritative instrument, and he cannot now insist upon any objection which he has so distinctly waived. It is clear too, from *Seaton's* having applied to the Marquis of *Exeter's* agents, that *he* considered he had been acting as bailiff to his lordship, and not to the sheriff.

Wilde, Serj., in reply.—(He produced the two warrants or mandates, which he had sent for to the *Temple*, during the argument, in order to shew their different form; their production was objected to on the other side, but the Court said, they were certainly at liberty to look at the documents which were expressly referred to in the affidavits).—The question amounts to this: will the Court proceed to attach the chief bailiff for not returning a mandate, which, in point of fact, has never been delivered to him? It is quite clear that the document, delivered to *Seaton* in this action, was not a mandate to the chief bailiff; it was directed by the sheriff to *Seaton* and *Job Doe*, "my bailiffs," how then can it be contended that it was delivered to *Seaton*, as the bailiff of the Marquis of *Exeter?* It was an ordinary warrant directed by the sheriff to his own officer. In the second action against the defendant, there was a proper mandate directed "to the chief bailiff of the hundred of the liberty of *Nassaburgh*;" this not only proves that the form adopted in the first instance was not the result of any inadvertency, but it also puts an end to the argument as to the presumed custom of directing the mandates to the deputy bailiff. As to the alleged interference on the part of the chief bailiff, it must be remembered, that the under bailiff had levied on the defendant's goods under a regular mandate, which would sufficiently account for his application to the legal advisers of his principal; but, even supposing there has

(*i*) 2 T. R. 5. That was an action against the Earl as chief bailiff of the liberty of *Hallamshire*, in the county of *York*, for an escape, which consisted in the removal to the county jail of a defendant arrested by virtue of a mandate from the sheriff. In delivering judgment, *Ashurst*, J., said, "when a writ is directed to him (the sheriff) to be executed within any liberty in his county, all that he can do is *to command the bailiff* of that liberty to execute the writ;" and *Grose*, J., said, "The Court first look to the sheriff for the execution of a writ: but if the defendant be within a bailiwick, a peculiar jurisdiction, the sheriff *makes out his mandate to the bailiff*, who then becomes answerable."

(*j*) *Parker* v. *Kett*, S. C. Lord *Raym.* 658.

been an improper interference, still that cannot create a mandate which has no previous existence, and impose an obligation upon the lord to return that which has never come to his hands. As to the argument drawn from *Seaton's* having levied under the warrant, it was competent to him to make the levy either as bailiff to the sheriff or to the *Marquis of Exeter;* and the warrant being directed to him by the sheriff, to make the levy as *his* bailiff, and delivered to him by the plaintiff, himself an attorney, it was of course made in that character, and no subsequent act on the part of the lord could alter the nature of that transaction. The lord may possibly have waived his right of action against the sheriff for executing a writ without a *non omittas* in his liberty, but that is the utmost effect that can be given to his subsequent acts.

TINDAL, C. J.—If the matter had rested on the first point, I confess I should have felt considerable difficulty in this case; but after the levy has been made and distinctly recognized by the lord of the franchise, I do not think that he is at liberty to dispute the fact of his having duly received the mandate. The document in question, is certainly in the form of an ordinary warrant to a sheriff's bailiff, and it appears that *Seaton* acted in a double capacity, sometimes as bailiff to the sheriff, sometimes as deputy bailiff to the lord of the franchise; in the present instance, there can be no doubt but that he himself understood he was acting as deputy bailiff to the *Marquis of Exeter,* from the fact of his applying to the Marquis's legal advisers as to what he should do with the proceeds; that fact alone, however, might not have precluded the Marquis, although in contemplation of law he must be presumed to know the acts of his deputy, but when we find *Seaton* acting under the advice given him by these parties, and paying over the money to the defendant's assignees, upon their giving an indemnity to the Marquis, I cannot entertain a doubt but that the latter is precluded from disputing the regularity of the document in question.

PARK, J.—If I had heard only the first part of the argument on the part of the plaintiff, I should certainly have thought his case was very weak; but the facts which have been laid before us clearly show that the special bailiff had adopted the acts of his man; it is quite manifest therefore, that he has no right now to say that he never received the mandate.

VAUGHAN, J.—I am of opinion that this rule must be discharged. We are asked if we can call upon a party to return a writ which he has not received; but the under bailiff *did* receive a writ, and the question is, in what character he so received it; the facts of the case shew he received and acted upon it as bailiff to the lord of the franchise. There has been a full adoption on his part of the acts of the bailiff, and he has placed himself in the situation of executor *de son tort,* by intermeddling in the matter; it seems to me impossible to come to any other conclusion, than that the *Marquis of Exeter* is responsible if he does not make a proper return.

BOSANQUET, J.—I am of the same opinion. If the argument had turned merely on the first point, namely, as to whether this was or was not a mandate, the result might have been doubtful, but on the second point I enter-

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tain no doubt; the bailiff pays over the money under the direction of Lord *Exeter's* agents, and his lordship cannot say these directions were given without proper authority.

Rule discharged with costs.

Jan. 18 & 20.

GRAINGER *v.* HILL and another.

1. In order to constitute an arrest it is not nesessary that there should be actual contact of the defendant's person.
2. In an action for illegally obtaining a chattel under duress of imprisonment, the plaintiff need not aver that the former suit was instituted without probable cause, or that such suit was terminated.
3. A wrongful taking of a chattel is a sufficient conversion to support *trover*; without proof of a subsequent demand and refusal.

THE declaration stated, for that whereas the plaintiff heretofore and before the time of committing the grievances by the defendants thereinafter mentioned, was master, sole owner, and proprietor of a certain smack or vessel thereinafter mentioned, and whereas also the plaintiff being such owner as aforesaid, and having occasion to borrow a certain sum of money to meet his occasions, applied to, and requested the defendants to lend and advance to him the sum of 80*l.*, which they the defendants agreed to do, upon having the re-payment secured to them, the defendants, by a mortgage of the said smack or vessel, and it was thereupon agreed by and between the plaintiff and defendants, that a mortgage of the said vessel should be accordingly made and given, and that the sum of money, so to be advanced and lent by the defendants as aforesaid, should afterwards be repaid by the plaintiff to the defendants on a certain day then agreed upon and not yet elapsed, to wit, the 28th day of *September*, A. D. 1837; and that in the mean time, he, the plaintiff, should retain the command of the said smack or vessel, and prosecute and make voyages therein, for his, the said plaintiff's, own profit and advantage, and thereupon afterwards, to wit, A. D. 1836, the defendants accordingly lent and advanced to the plaintiff, upon and in pursuance of the said agreement, and upon the security aforesaid, the said sum of 80*l.*, and the plaintiff also thereupon in pursuance also of the said agreement, by a certain indenture then made, signed, sealed and delivered, by the defendants of the one part, and the plaintiff of the other part, and which indenture, &c., (*profert*), for and in consideration of the said sum of 80*l.*, of lawful money of *Great Britain*, to him then in hand, well and truly paid by the said defendants, did grant, bargain, sell, assign and set over unto the said defendants, among other things, sixty-four full and equal undivided sixty-fourth parts of all the said ship or vessel, called "The *Nimble*," together with all and singular, the masts, sails, sail yards, anchors, cables, ropes, cords, guns, gunpowder, ammunition, small arms, tackle, apparel, boats, oars and appurtenances, and also a certain instrument or policy of insurance effected at *London* and bearing date a certain day, to wit, the day and year last aforesaid, whereby the said sixty-four full and equal sixty-fourth parts of the said ship and premises were insured in the sum of 250*l.* sterling, from loss or damage, *to have and to hold*, &c., the said sixty-four, &c., parts of the said ship, &c., and policy and premises thereby assigned unto the said defendants, their executors, &c., to and for their own use and benefit, subject nevertheless to the following proviso, for redemption thereinafter contained, that is to say; *provided always*, and it was thereby agreed, by and between the said parties to the said indenture, that if the plaintiff did and should well and truly pay, or cause to be paid, unto the defendants, the said full sum of 80*l.* of lawful money, &c., together with interest for the

same in the mean time, at and after the rate of *5l. per centum, per annum*, on the 28th of *September*, A. D. 1837, then next ensuing, then the said indenture and every thing therein contained, should be and become utterly void; and the plaintiff did, in and by the said indenture, &c., (covenant to pay the 80*l.* as above), and the plaintiff, in fact, further saith, that the defendants wrongfully, illegally and maliciously contriving to injure, harrass and distress the plaintiff, and to compel him, the plaintiff, by and through fear and duress of imprisonment, to give up and relinquish to them the defendants, certain goods and chattels, of and belonging to him the plaintiff, and not included in the said mortgage security; to wit, a certain certificate of the register of a certain smack or vessel, to wit, the said smack or vessel; and without which, he the plaintiff, could not go to sea, or prosecute his said voyages in manner aforesaid, as agreed upon by and between the plaintiff and defendants, as the defendants then well knew, long before the said time so appointed as aforesaid, for the payment of the said sum of 80*l.*, to wit, on the day and year last aforesaid, called upon and requested payment, of and from the plaintiff, of the said sum of 80*l.*, and then threatened to arrest him for the same, unless he immediately paid to them the amount thereof; and the plaintiff further saith, that upon his, the plaintiff's, refusing so to do, they the defendants, wrongfully and unjustly contriving and intending as aforesaid, and to imprison, harrass, oppress, injure and impoverish the plaintiff, and to cause and procure him to be arrested and imprisoned, and to prevent his making and prosecuting any voyages whatsoever in his said smack or vessel, and wholly to ruin the plaintiff thereby, well knowing that the plaintiff was wholly unprepared and unprovided with bail, theretofore, to wit, on the 26th of *November*, A. D. 1836, falsely and maliciously caused and procured to be sued and prosecuted out of the Court of the said Lord the King, of the Bench, at *Westminster*, for the said sum of 80*l.* a certain writ of our said Lord the King, called a *capias*, directed to the sheriff of *Kent*, bearing date a certain day and year therein mentioned, to wit, &c., by which said writ our said Lord the King, &c. (setting forth the *capias* in *debt*); and the defendants contriving and intending as aforesaid, afterwards, to wit, on, &c. aforesaid, wrongfully, illegally and maliciously, caused and procured the said writ to be, and the same then was, marked and indorsed for bail, for 95*l.* 17*s.* 6*d.*, and the said writ being indorsed for bail as aforesaid, the defendants afterwards, and before the said return thereof, to wit, on the 26th of *November* aforesaid, contriving and intending as aforesaid, *wrongfully, and maliciously caused the plaintiff to be, and he there was arrested by his body*, under and by virtue of the said writ, and was thereupon imprisoned and kept and detained in prison for a long time, to wit, for the space of twelve hours then next following, until he, the said plaintiff, not being prepared or provided with bail to the said action, by and through fear and duress of imprisonment, was forced and compelled to give up and relinquish to them the goods and chattels before mentioned, to wit, the said register and certificate of registry, and did so give up and relinquish the same, and the defendants have thence hitherto wrongfully and unjustly, and against the consent and will of the plaintiff, forcibly and against law, kept and detained the same from the plaintiff; by means of which said several premises, the plaintiff being, as the defendant before and after the time of the said arrest well knew, wholly unprepared and unprovided with bail whilst he was so imprisoned as aforesaid, not only suffered great pain of

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body and mind, but was greatly exposed and injured in his credit and circumstances, and was hindered and prevented from performing and transacting his lawful business and affairs by him, during that time, to be performed and transacted, and especially the plaintiff saith, that by means of the premises he, the plaintiff, hath been wholly prevented and deterred from making and prosecuting with the said smack or vessel, divers, to wit, four several voyages with and in the said smack, &c., to wit from *London* to *Caen* and back again, and hath lost and been deprived thereby of all the benefit, profit, and advantage, which would have otherwise flowed and accrued to him, the plaintiff, therefrom, and hath been and is, by means of the premises, otherwise greatly injured and damnified.

2d. *Count* in *trover*, for a certain other register of, and a certain other certificate of the registry of the said smack or vessel.

Plea.—Not guilty.

At the trial, before *Bosanquet*, J., it appeared that the plaintiff had mortgaged a vessel to the defendants for 80*l.*, as stated in the declaration; that the time of paying it off was the 28th *September*, 1837; that the defendants on the 26th *November*, 1836, sued out a *capias* in *debt* against the plaintiff for 95*l.* 17*s.* 6*d.*; that the defendant, *Hill*, gave the sheriff's officers instructions to execute the writ with gentleness, and to take the registry of the vessel in lieu of bail; that the sheriff's officers came with the warrant to the plaintiff's house, where he was ill in bed, and told him they wanted the registry, and that if he did not deliver it up, they must *either take him, or leave a man with him*; that the registry was delivered up to them, and they went away: no actual contact of the plaintiff's person was proved: it was also proved that the defendants had paid the caption fee for taking the plaintiff, and had been repaid by him.

Taddy, Serjeant, for the defendants, submitted, *first*, that no arrest had been proved; *secondly*, that there was no proof of the determination of the former suit, which, by analogy to actions for malicious arrests and prosecutions, he contended was necessary; *thirdly*, that there was no proof of malice; and *fourthly*, as to the count in *trover*, that there was no proof of any demand on the part of the plaintiff.

The learned judge reserved all the points, but ruled against the defendants upon all of them.

Taddy, Serjeant, accordingly, in a former term, obtained a rule *nisi*, either for a nonsuit, or a new trial, and also for arrest of judgment (*a*), by reason of there being no averment of want of probable cause in the first count.

Talfourd, Serjeant, and *James*, now shewed cause. As to the *first* point, an arrest was sufficiently proved; it was not necessary that there should be an actual contact of the party; the case of *Horner* v. *Battyn* (*b*), which had been

(*a*) Some discussion arose during the argument, as to whether by the terms of the rule the plaintiff was called upon to show cause, why there should not be an arrest of judgment; the words of the rules were, "and why *the entry of final judgment* upon the verdict for the plaintiff on the trial of this cause, should not be *stayed*." The Master, however, stated that this was the usual form, and the plaintiff's counsel showed cause accordingly. In the Queen's Bench and Exchequer, the form is, "why *the judgment* on the verdict obtained in this cause, should not be *arrested*." See T. Chitty's Practical Forms, 2d ed. 710.

(*b*) B. N. P. 62. "*Per curiam*, if

cited on behalf of the defendants at the trial, was an authority against them, for it established the principle, that if a party submitted to the process, it was sufficient to constitute an arrest, though there was no manual touch; now here there was a complete submission to the process, by giving up the registry.

To the *second* objection, viz., that there was no proof of the determination of the former suit, there were three answers: first, that it was not necessary in this form of action, for there is no analogy between this action and one for malicious arrest; there the termination of the former suit must be shewn in order to establish the want of probable cause; but it is not necessary here, where the cause of action is the abuse of the process of the Court; and even

the bailiff, who has a process against one, says to him, when he is on horseback, or in a coach, 'you are my prisoner, I have a writ against you,' upon which, he submits and turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process: but if instead of going with the bailiff, he had gone or fled from him, it could be no arrest, unless the bailiff had laid hold of him." In *Williams* v. *Jones* (Ca. temp. Hard. 298; S. C., but not S. P. 2 Stra. 1049,) it is laid down, that an arrest may be made without touching the person, as if a bailiff comes into a room, where the defendant is, and having *locked the door*, tells him that he is arrested, that is an arrest; for the defendant is *in the custody* of the officer: the same doctrine is recognized by Sir *J. Mansfield*, C. J., in *Arrowsmith* v. *Le Mesurier*, (2 N. R. 211,) but in that case, where a warrant had been granted by a magistrate, for apprehending the plaintiff, and the constable went with it to the plaintiff and shewed it him, and at his desire, permitted him to take a copy, after which the plaintiff attended the constable before the magistrate, but the constable had never touched the plaintiff; it was held, that there was no arrest, upon the ground, as the Lord C. J., said, that "the plaintiff went *voluntarily* before the magistrate;" and that "the warrant was made no other use of than as a summons." The case of *Horner* v. *Battyn* was not however cited. It is not easy to reconcile these two cases (a); and the one last mentioned, would appear to establish the more intelligible principle, that a submission to restraint under legal process, or compulsion, or what is considered by the party as such, will constitute an arrest, or what the law terms an *imprisonment;* thus in a case mentioned by Mr. *Starkie*, in his work on Evidence, (vol. ii. p. 812, n. (d.)) "where a constable *required the plaintiff* to go along with him before a magistrate, information having been given to the constable, by the defendant, that the plaintiff had committed a felony, and the plaintiff accordingly *accompanied the constable;* *Bayley*, J., held, (after the cases on the subject had been cited) that there was a sufficient imprisonment to sustain the action;" and the learned author states, that he has known more than one case, in which words alone have been held sufficient to constitute an imprisonment. See also *Bridgett* v. *Coyney*, (1 M. & R. 211,) *Wood* v. *Lane*, (3 C. & P. 774,) and *Peters* v. *Stanway*, (6 C. & P. 737,) where *Alderson*, B., drew a distinction "between the case of a person who volunteers to go in the first instance, and that of a person who, having a charge made against him, goes voluntarily to meet it." But where there has been *no restraint*, the decisions are uniform, that *mere words* will not constitute an arrest; as in *Simpson* v. *Hill*, (1 Esp. N. P. C. 431.) where the defendant sent for a constable, and gave the plaintiff in charge to him, but the constable never touched the plaintiff, or took her into custody, or used any words, expressing that she was a prisoner; for the plaintiff, on seeing her frightened, said to the constable, that he would not trouble him further at that time; and the constable departed; this was ruled by *Eyre*, C. J., not to be an imprisonment. So in the earlier case of *Genner*

(a) In *Berry* v. *Adamson*, 9 D. & R. 558; 5 B. & C. 528, the authority of *Arrowsmith* v. *Mesurier* was recognised. In *Wood* v. *Lane*, 3 C. & P. 774, *Tindal*, C. J., said, that it was a case which had often been spoken of, as going to the very extreme point.

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in an action for a malicious arrest, the Court have held that the want of such an averment is cured by verdict, *Skinner* v. *Gunton* (*c*). Secondly, the fact of the termination of the former suit, is not put in issue by the plea of *not guilty*; for that plea puts in issue only the wrongful act done (*d*), which here is the unlawful obtaining of the registry, under colour of an arrest. In *Drummond* v. *Pigou* (*e*), which was an action for maliciously procuring the plaintiff to be outlawed, the Court expressed a strong opinion that the reversal of the outlawry was not put in issue by the plea of *not guilty*.—[*Tindal*, C. J. —There the plaintiff averred in his declaration that the outlawry was *duly reversed*; there is no allegation here that the former suit had been terminated.]—The defendants might have pleaded specially that it was not terminated, if such fact would have afforded them a defence; or if it ought to have been alleged, they might have demurred. Thirdly, if it was necessary, it was amply proved, as the costs had been paid by the plaintiff, and received by the defendants, including the caption fee; this would be sufficient in such a case as the present, although stricter proof is generally required in cases of malicious arrest, *Webb* v. *Hill* (*f*). In *Brooke* v. *Carpenter* (*g*), however, the production of a rule of Court, by which the plaintiff had been discharged out of custody, was held a sufficient proof of the determination of the suit; so in *Pierce* v. *Street* (*h*), proof that no declaration had been filed or delivered within a year after the return of the writ, was held sufficient (*i*).

With regard to the *third* point, the alleged defect of proof of malice on the part of the defendants; no proof of actual malice was requisite; *malice*, in law, signifies merely an improper motive, and there was ample evidence of that.

As to the ground upon which the arrest of judgment had been moved, namely, that there was no allegation in the declaration of want of probable cause, that also was not necessary in this form of action; if the action had been brought on the justest grounds, still the extorting of the registry would have been an illegal act, which would have given the plaintiff a cause of action.

With regard to the objection raised to the count in *trover*, that no conversion had been proved, the wrongful assumption of the plaintiff's property under duress was a sufficient conversion, and it was not necessary that there should be any subsequent demand.

Taddy, Serjeant, and *R. V. Richards*, in support of the rule. As to the

v. *Sparks* (Salk. 79; 6 Mod. 173,) where the plaintiff, having a warrant against the defendant, went to him in his yard, and being at some distance, told him he had a warrant, and said he arrested him; but the defendant having a fork in his hand, kept off the plaintiff from touching him, and retreated into his house; it was held there was no arrest. See also *Bieten* v. *Burridge*, (3 Camp. 139,) *Russen* v. *Lucas*, (1 C. & P. 153; R. & M. 26,) *Berry* v. *Adamson*, (2 C. & P. 503; 9 D. & R. 558; 6 B. & C. 528,) *Amor* v. *Blofield*, (2 Mo. & Sc. 156, 9 Bing. 91,) *Bates* v. *Pilling*, (2 C. & M. 374; 2 Dowl. 367,) *Reece* v. *Griffiths* (5 M. & R. 120,) *George* v. *Radford*, (3 C. & P. 464; M. & M. 244,) *Cant* v. *Parsons*, (6 C. & P. 504,) *Hender* v. *Robins*, (1 Har. & Wol. 204; S. C. nom. *Robins* v. *Hender*, 3 Dowl. 543.)

(*c*) 1 Saund. 228, c.; S. C. 1 Vent. 12, 18.

(*d*) R. G. H. 4 W. 4. *Case* IV. 1.

(*e*) 2 Bing. N. C. 114; S. C. 1 Hodg. 190; 2 Scott, 228.

(*f*) Moo. & Mal. 253; S. C. 3 C. & P. 485.

(*g*) 11 Moo. 59; S. C. 3 Bing. 297.

(*h*) 3 B. & Ad. 397.

(*i*) See also *Arundell* v. *White*, 14 East, 216

first point; there was no sufficient arrest to satisfy the allegation in the declaration; the plaintiff gave up the registry under *fear* of an arrest, but no arrest actually took place, though the transaction came up perhaps to the very point of one: the instructions to the sheriff's officers were "*either to take* the plaintiff, or to leave a man with him." The other side have argued as though the instructions had been "to take the plaintiff *away*." The registry is given up as soon as these instructions are communicated to the plaintiff; the whole transaction amounted merely to this, that the officer said, in effect, to the plaintiff, if you don't do a certain thing, I must arrest you; the thing is done, and the officer departs without making the arrest. Then as to the caption fee having been paid; it is usual to pay the fee if the officer goes for the purpose of arresting a party, although no actual arrest takes place. In the case of *Guest* v. *Elwes* (*j*), tried before *Alderson*, B., on the *Oxford* circuit, last summer two years, which was an action against the sheriff; the plaintiff had originally inserted two counts, one for not arresting the party, and the second for an escape; he was limited however to one of these counts, and selected the latter, thinking his evidence strongest upon that. At the trial, the officer was called, who stated that he told the party he had a writ against him; that they walked together to an inn, (but not arm in arm); that they slept in the same room, and that in the night-time the party escaped: the learned judge held that there was no arrest, as no contact had been proved.—[*Talfourd*, Serjeant—In that case, the officer expressly stated that the party was never in his custody.]—[*Park*, J.—I have the greatest respect for the decision of Mr. Baron *Alderson*, but I own I cannot understand how it can be said if a bailiff tells a party he has a writ against him, and the party thereupon accompanies him, that this is not an arrest.]—In this case there was no evidence that the writ had been produced, or that any words expressive of an arrest had been used.

Secondly, as to the want of proof of the termination of the suit; there was no allegation to that effect in the declaration, and undoubtedly before the new rules, the Court would have supplied that defect after verdict; but it being a material allegation, it should have been averred, together with the manner of the termination, *Lewis* v. *Farrel* (*k*), *Wine* v. *Ware* (*l*), *Goddard* v. *Smith* (*m*); otherwise the defendants had no opportunity of traversing it; and if material to have been averred, it should have been proved; and not having been proved, it is a ground of nonsuit. It would be an absurdity to allow an action to be brought against a party for bringing a former action, without shewing that such former action had been terminated; the right to sue could not be established till a verdict, or some other termination of the former suit. It is said, indeed, that here it is immaterial whether the former suit be terminated or not; but that cannot be so, for if the plaintiff has a good cause of action, he may institute a suit, no matter how maliciously, and there can be no wrong done. There is nothing in this case to prevent the defendants from going on with their action; the Court perhaps, might stay them, but till then, they would have a right to go on. The Court can only act upon their rules, or upon the record; and even

(*j*) Reported 5 A. & E. 118, and (by the name of *Geast* v. *Elwes*), 6 N. & M. 433, but not upon the same point.

(*k*) 1 Stra. 114, & see the note to *Skinner* v. *Gunton*, 1 Wms. Saund. 228, d.

(*l*) Sid. 15.

(*m*) 6 Mod. 261; S. C. Salk. 21.

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a judge's order to stay proceedings, has been ruled by Lord *Kenyon*, not to be sufficient evidence that a suit was at an end, *Kirk* v. *French* (*n*).

Thirdly, there was no proof of *malice;* the only object of the defendants was to obtain the registry. In *Savil* v. *Roberts* (*o*), it is said, "that it shall lie on the plaintiff's side to prove an express rancour and malice;" and in *Sikes* v. *Dunbar* (*p*), Lord *Kenyon* held the same doctrine (*q*).—[*Tindal*, C. J. —The term *malice*, means the doing something against law; it is not necessary that it should be done vindictively, but it must be, wilfully.]

Fourthly, as to the absence of any allegation of want of probable cause: this is a new form of action, there being no precedent for it, but it bears a close analogy to an action for a malicious arrest, in which it has always been held necessary to aver and prove want of probable cause, and it cannot be inferred, even from the most express malice; *Johnstone* v. *Sutton* (*r*), *Reed* v. *Taylor* (*s*), *Willans* v. *Taylor* (*t*), *Drummond* v. *Pigou* (*u*), *Cotton* v. *James* (*v*).

Fifthly, as to the conversion; this was the case of the receipt of a chatel, not under any claim of right, but for a particular purpose; this of itself was not a conversion to the use of the defendants; there was no exercise of right on their parts: then there was no subsequent demand as evidence of a conversion; and it is not every unlawful taking which will amount to a conversion.

TINDAL, C. J.—This is a special action on the case brought against the defendants, for having unlawfully obtained the registry of a vessel from the plaintiff, by means of an arrest. The declaration states in effect, that the plaintiff had borrowed a sum of money from the defendants, and had given them, by way of security, the mortgage of a ship; that the money was to be repaid in *September*, 1837; and that in the month of *November*, 1836, the defendants maliciously arrested the plaintiff, in order to force him to give up the registry in question, which was not included in the original mortgage; there is also a count in *trover* for the registry. The defendants have pleaded only the general issue. The plaintiff at the trial having obtained a verdict, the defendants have obtained a rule, calling upon the plaintiff to shew cause, why, instead of that verdict, a nonsuit should not be entered; or why there should not be an arrest of judgment.

The grounds upon which the rule was moved for are, *first*, that the allegation in the declaration, that the plaintiff was arrested, has not been made out in proof; but after hearing all the evidence that was brought forward at the trial, I confess, I cannot entertain any doubt, but that an arrest was sufficiently proved. It appears, that the sheriff's officer having the warrant in his possession, told the plaintiff, who was lying ill in bed, the purpose of his coming, that unless he gave up the registry, he must either take him

(*n*) 1 Esp. 80. "That case has since been doubted;" *Per Park*, J., in *Drummond* v. *Pigou*, 2 Scott, 233, & see the cases there cited.
(*o*) Salk. 13; S. C. 2 Lord Raym. 374.
(*p*) 1 Camp. 202, n.
(*q*) Salk. 15.
(*r*) 1 T. R. 510, 544; S. C. 1 Bro. P. C. 76.
(*s*) 4 Taunt. 616.
(*t*) 6 Bing. 183; S. C. 3 M. & P 350; affirmed on error, 1 B. & Ad. 845.
(*u*) 2 Bing. N. C. 114; S. C. 1 Hodg. 190; 2 Scott, 228.
(*v*) 1 B. & Adol. 128.

or leave a man with him; this certainly must mean, that he would take him away, having previously done that which was equivalent to an arrest; the plaintiff upon this gives him up the registry, which, according to the officer's instructions, was to be taken *in lieu of bail*. These facts appear to me to bring the case clearly within the principle of *Horner* v. *Battyn* (*w*), and to constitute a complete submission to the process, on the part of the plaintiff. Then, afterwards we find that the suit is arranged, that the caption fee, a fee which, *ex vi termini*, is chargeable in respect of the actual taking of a party, is paid to the sheriff by the defendants, and repaid to them by the plaintiff; after this it seems to me impossible that the defendants can contend there has been no arrest.

The *second* objection is two-fold; that the plaintiff does not disclose a sufficient cause of action, inasmuch, as he does not allege, that the former suit had been instituted without probable cause, or that such suit had been terminated. Now, if this action were analogous to one for a malicious arrest or a malicious prosecution, there is no doubt that the declaration would be bad, for want of these allegations; but this action is of a wholly distinct and different nature; it is brought for having employed a sheriff's officer to abuse the process of the Court, and thereby extorting a certain document from the plaintiff. It is in evidence, that the defendants gave instructions to the sheriff's officers, which were different from the exigency of the writ; their duty under the writ was to take the plaintiff's body, and when they had him in custody they had no more right to demand the registry, than any other of the plaintiff's goods and chattels. The sheriff's officers have been guilty of misconduct, and might have been sued for it; if they had demanded and taken too large a fee, the sheriff would have been liable to an action on the case, for damages; *King* v. *Marsack* (*x*); and in this case, the instructions are given to the officers by the defendants, and, therefore, they are liable for the consequences. It is said, this is a new form of action, and that there is no precedent for it; but that is no objection, if the action is otherwise maintainable; it seems to me this case falls within the general rule, that where a party has received an injury from the wrong of another, he may have his remedy by an action on the case; now here there are both *damnum et injuria*, the defendants have committed a wrong, and the plaintiff has been injured by it. I think, therefore, that it is not necessary for the plaintiff to shew either want of probable cause, or the termination of the former suit; and, consequently, that the ground for the arrest of judgment fails.

The *last* objection arises upon the count in *trover*; and the question here is, whether there has been a *wrongful* taking; if there has, a subsequent demand is not necessary, for either a wrongful taking, or a wrongful holding, is a conversion in law; now in this case, there can be no doubt as to the character of the taking, inasmuch as the defendant obtained possession of the plaintiff's property against his will, which, for this purpose, is equivalent to an act of trespass. The rule therefore must be discharged, and the *postea* delivered to the plaintiff.

PARK, J.—There is certainly a very general notion abroad, that unless the

(*w*) Bull. N. P. 62.

(*x*) 6 T. R. 771; *vide per* Lord *Kenyon*, *Ib.* 772.

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person's body is touched, there can be no arrest; and this opinion has, perhaps, been strengthened by what is said in *Salkeld*, 79 (*y*), and cited in *Bull.* N P. 162, that "bare words will not make an arrest," but the other case cited in *Bull*, N. P. (*z*), shows that this doctrine must be taken with some limitation; upon this point, it is enough for me to say, that I entertain no doubt but that an arrest was fully established at the trial of this cause.

As to the grounds that have been urged for an arrest of judgment, namely, the want of any allegation in the declaration, of want of probable cause, or of the former suit having been determined, I think they were not necessary in this form of action; a comparison has been drawn between this case and actions for malicious arrest; and the cases which have been cited with reference to the latter class of actions, are undoubtedly good law; but they do not apply to this case, which is one *primæ impressionis;* the *gist* of this action is an injury arising from a shameful and scandalous abuse of the process of the Court, by means of which, a man lying sick in bed has been compelled to deliver up his property; it is just the same, as if, by the same means, they had taken a gold watch from him. If a new species of tyranny is introduced, those who administer the law should allow the application of a new remedy. I do not go through the cases that have been cited on this point, as I think they have no application to the present action.

As to the count in *trover*, it was not necessary that there should be any demand. A demand and refusal are only evidence of a conversion, but here a conversion itself was proved. The case of *Parker* v. *Patrick* (*a*), is something analogous to the present; there goods had been obtained by a person from the defendant, by means of a fraud, and pawned to the plaintiff for a valuable consideration, without notice of the fraud; the person who had obtained them, was convicted on the prosecution of the defendant, who obtained possession of the goods again, and it was held, that the plaintiff might maintain *trover* for them. That case is not so strong as the present. *Wyatt* v. *Blades* (*b*), is an authority to shew that where there has been a conversion, a demand is not necessary, and there are other cases to the same effect collected in *Carlisle* v. *Garland* (*c*).

VAUGHAN, J.—This case has been very ably and elaborately argued on both sides, but I am of the same opinion with my Lord and my brother *Park*, that the plaintiff is entitled to judgment. The plaintiff can only recover *secundum allegata et probata;* the question then is, what has been alleged and proved in this case. The declaration states, in effect, that under force of duress, the plaintiff was compelled to give up the registry of his vessel; and the facts in evidence sufficiently establish that an actual arrest took place. The defendants had in fact no cause of action, their demand was premature, but they thought it was a good opportunity, as the plaintiff was sick in bed, to obtain the registry from him, and they do this by means of an illegal arrest: it is clear, that in order to constitute an arrest, an actual con-

(*y*) *Genner* v. *Sparks;* the marginal note to that case is, "no arrest can be without actual touching the defendant;' but this position is clearly not borne out by the case; see *ante*, p. 44, n. (*b*).

(*z*) *Horner* v. *Battyn*.

(*a*) 5 T. R. 175.

(*b*) 3 Camp. 396.

(*c*) 5 M. & P. 102; 7 Bing. 298; S. C. in error, in Cam. Scac. 4 Mo. & S. 24; 2 C. & M. 31; 3 Tyr. 705; S C. in error in Dom. Proc. 4 Scott, 587; 4 Bing. N. C. 7.

tact of the person is not necessary. The present case stands upon its own circumstances, and has no analogy with actions for malicious arrests or prosecutions. The defendants abuse the process of the law, and are guilty of perjury in so doing, no debt being due at the time the writ is sued out; and even if it were necessary to establish want of probable cause, I think it is to be clearly inferred, from the allegations in the declaration; as want of a probable cause is a mixed question of law and fact for the jury to decide, *Ravenga* v. *Macintosh* (*d*).

As to the conversion, it is clear, that here is a tortious taking, nearly as much so, as if the deed had been demanded of the plaintiff, with a pistol held at his head.

BOSANQUET, J.—The points in this case have been so fully discussed, that I have no inclination to add any more, than to say, that I retain the opinion I formed at the trial. The facts were then fully stated, and I thought that an arrest was quite sufficiently proved. As to the determination of the former writ, it is not necessary either to be averred or proved in this form of action; for this is not an action for maliciously doing that which the law would otherwise authorize, but for abusing the process of the law, for the ulterior purpose of doing that which the law does not authorize. As to the count in *trover*, the registry was tortiously taken from the plaintiff, as much so, as if it had been taken contrary to his express directions; and there can be no doubt that would be a conversion.

Rule discharged.

(*d*) 2 B. & C. 693; S. C. 4 D. & R. 187; 1 C. & P. 204.

COLLINS *v.* JENKINS.

Jan. 20

In a horse cause, proof that a letter was written in the county of *Middlesex*, giving notice to the defendant of the horse's unsoundness, and was afterwards seen in the same county in the possession of his attorney, was held sufficient to satisfy the usual undertaking upon which the plaintiff had brought back the venue to that county.

THIS was an action of *assumpsit* upon the warranty of a horse, alleging his unsoundness. *Pleas*:—1st, Traversing the warranty; 2d, The unsoundness.

The venue was originally laid in *Middlesex*; it had been changed, upon the defendant's application, into *Worcestershire*, and restored upon the usual undertaking by the plaintiff, to give material evidence in the original county.

At the trial before *Tindal*, C. J., at the Sittings after last Term, in *Westminster*, the only evidence to satisfy the undertaking, was; *First*, that a letter, written by the plaintiff's attorney to the defendant, giving notice of the unsoundness of the horse, dated from his office in *King-street, London*, and bearing the post-mark of *Lambeth*; had been in fact written at the attorney's private residence in *Burton-crescent*, in the county of *Middlesex*, and there delivered by him to the plaintiff, who posted it at *Lambeth*; and *Secondly*, that such letter was afterwards seen in the possession of the defendant's attorney, at the house of the plaintiff's attorney, in *Burton-crescent*.

[It was also argued that the evidence of Mr. *Sewell*, the veterinary surgeon, who had attended the trial, and heard the evidence, and thereupon formed his opinion of the unsoundness of the horse, to which he afterwards deposed as a witness, though he had not personally inspected the animal, was sufficient to satisfy the undertaking; but as the Court decided the case without adverting to this point, it is not necessary to repeat the argument upon it.]

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The plaintiff recovered a verdict.

Talfourd, Serjt. having obtained a rule *nisi* to set aside this verdict and enter a nonsuit, on the ground that the undertaking had not been satisfied.

Wilde, Serj. and *Channell*, now shewed cause.—It was important, though not absolutely essential, to shew that notice of the unsoundness had been given within a reasonable time, so as to give the defendant an opportunity to inspect the horse, and also for the purpose of increasing the plaintiff's damages. In *Fielder* v. *Starkin* (*a*), Lord *Loughborough*, C. J., said "the not giving notice will be a strong presumption against the buyer, that the horse at the time of the sale, had not the defect complained of, and will make the proof on his part much more difficult." The letter in question amounted to a tender of the horse, which may be in writing; and without such tender the plaintiff could not recover for the keep of the horse, *Caswell* v. *Coare* (*b*); *Mackenzie* v. *Hancock* (*c*); *Ellis* v. *Chinnock* (*d*). In *Linley* v. *Bates* (*e*), it was held than an undertaking to give material evidence in an action for goods sold, was satisfied by proof of letters, containing invoices of the goods, having been put into the post-office of the county, to which the undertaking applied, at the time the goods were forwarded. The cases of *R.* v. *Burdett* (*f*), *R.* v. *Johnson* (*g*), *R.* v. *Watson* (*h*), *R.* v. *Williams* (*i*), all bear upon this point; in these latter cases however, the question was as to the *publication* of libels; but in a question like the present, the fact of *writing* a letter was more material to the question in issue, than the fact of putting it into the post; *Smith* v. *Walker* (*j*). Any fact which tends to increase the plaintiff's right to damages is material evidence to satisfy the undertaking, as in *Curtis* v. *Drinkwater* (*k*), which was an action against a coach proprietor for negligence: it appeared that the coach travelled from *Oxfordshire* into *Worcestershire*; that the plaintiff being an outside passenger, was thrown from the coach, and suffered an injury in the former county, and was afterwards removed to the latter; and it was held that the inconvenience suffered, and expense incurred, by the plaintiff in the latter county, was material evidence of matter arising there, so as to satisfy an undertaking to bring back the venue. So the material fact of the receipt of the letter by the defendant, was shown by its being in possession of his attorney in *Middlesex*.

Talfourd, Serjt. and *Shee*, in support of the rule.—The Courts have certainly gone very far in construing such an undertaking as the present; as in *Soulsby* v. *Lee* (*l*), where the Court seem to have been of opinion, that if the local evidence be the trading of a bankrupt, or a petitioning creditor's debt within a county; yet if the defendant did not give notice of his intention to dispute the commission, so that the mere production of the commission and the proceedings under it would prove the trading, &c., the undertaking need not be further complied with: but there the proof of these facts upon such notice

(*a*) 1 H. Bl. 17.
(*b*) 1 Taunt. 566.
(*c*) Ry. & Moo. 436.
(*d*) 7 C. & P. 169.
(*e*) 2 Cr. & J. 659; S. C. 2 Tyr. 746.
(*f*) 3 B. & A. 717; 4 B. & A. 95.
(*g*) 7 East, 65.
(*h*) 1 Camp. 215.
(*i*) 2 Camp. 506.
(*j*) 2 Moo. 64.
(*k*) 2 B. & Adol. 169.
(*l*) 3 Taunt. 86.

being given, would be essential to the plaintiff's right to recover; the Court will not, however, be disposed to relax the rule any farther. The plaintiff undertakes "at the trial of the cause to give material evidence of *some matter in issue* arising in the county of *Middlesex*,"—how could it be said that any of the facts under discussion were material evidence of any matter in issue between the parties? the issues were two; *First*, that there had been no warranty; *Secondly*, that the horse was not unsound: the letter of the plaintiff's attorney had nothing to do with these issues; but even supposing it had, still the place where it was written was wholly immaterial; *R.* v. *Burdett* and that class of cases, rather support this proposition. Nothing is shown here but the bare writing; it might as well be contended that the fact of mending a pen in the county of *Middlesex*, with which the letter was written elsewhere, would be material evidence.—[*Tindal*, C. J.—There was evidence that the letter had been delivered by the attorney to the plaintiff in *Middlesex*, and thereby put in progress to the defendant.]—The letter can hardly be said to be put in progress till it is posted, and that took place in *Surrey*.—[*Tindal*, C. J.—There was also evidence of the receipt of the letter in *Middlesex*.]—The case of *Curtis* v. *Drinkwater* was distinguishable from the present, for there the expences incurred by reason of the accident would form part of the damages to be recovered by the plaintiff.

TINDAL, C. J.—It appears to me that the case of *Curtis* v. *Drinkwater* cannot be distinguished in principle from the present; that case in effect decides that evidence of facts which increase the plaintiff's claim to damages, is a sufficient compliance with the undertaking to bring back the venue; now here, the writing the letter, giving notice of the horse's unsoundness, and the fact of that letter being afterwards in the possession of the defendant's attorney, were undoubtedly facts material to increase the damages, and therefore satisfied the undertaking.

PARK, J.—I am of the same opinion. It is a great mistake to suppose that the words, "some matter in issue," which occur in the rule, drawn up on the plaintiff's undertaking, merely mean the matters set up in the pleadings.

VAUGHAN, J.—The argument, on the part of the defendant, has turned upon the comparative merits of the evidence; but it is not a question of *degree* of materiality, so that the evidence given be material.

BOSANQUET, J, concurred.—His lordship referred to the case of *Gosling* v. *Birnie* (*m*), where proof of a conversation with the defendant, referring to matters involved in the cause, although taking place after the writ was sued out, was held to satisfy the plaintiff's undertaking.

Rule discharged.

(*m*) Moo. & Mal. 531.

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Jan. 22.

COLLINS *v.* AARON.

The plaintiff in *assumpsit* claimed only the balance of an account; the defendant pleaded payment of a sum which had in fact been paid before the balance was struck; the plaintiff thereupon obtained leave to amend, by increasing the amount of his damages:—*Held*, that the defendant was not entitled to plead *de novo*, but that he should have applied to amend his plea.

A Judge at chambers upon an application to amend a declaration, has authority to fix the costs of the amendment.

ASSUMPSIT for goods sold; damages 100*l.* Particulars, for 85*l.* due upon the balance of an account. *Pleas:—Non assumpsit;* and payment of 33*3l.*

The plaintiff, upon an affidavit that this last mentioned sum had been paid before the balance was struck, obtained an order from Mr. J. *Park* to amend his declaration by increasing the damages to 500*l.*, upon payment of costs. The defendant at the same time applied for leave to plead *de novo*, but the order was made without any such condition.

The parties went before the Master to tax the costs of the amendment, when the defendant charged the costs for pleading *de novo;* this having been objected to by the plaintiff, the parties went again before the Judge, who decided that leave to plead *de novo* had not been given. Upon a discussion as to the amount of the costs for the amendment, the defendant's attorney having claimed an extravagant sum, the learned Judge fixed them at 3*s.* 4*d.*

Bayley, for the defendant, had obtained a rule *nisi* to discharge the Judge's order, and for leave to plead *de novo*.

Wilde, Serjt., shewed cause.—As to the Judge's power to fix the amount of costs upon the amendment, he produced an order made by *Alderson*, B., in a case of *Burnet* v. *Wills*, to amend a declaration upon payment of 5*s.* 4*d.*: upon the other point he was stopped by the Court:

Bayley, in support of the rule.—If the plea requires alteration in order to suit the amended declaration, the defendant has a right to plead *de novo*. As the plea now stands, it is demurrable; for a defendant cannot plead the payment of a smaller sum in satisfaction to a claim of a larger amount, *Thomas* v. *Heathorne* (*a*); the defendant now proposed to plead *non assumpsit*, except as to 33*3l.*, and as to that, payment.

With regard to the allowance of 3*s.* 4*d.* by the Judge, it was not within his lordship's jurisdiction to tax the costs; nor was the amount allowed reasonable; as the sum claimed, being above 20*l.*, the defendant was entitled to the higher scale of taxation.

TINDAL, C. J.—The defendant was wrong in the first instance, in insisting before the Judge, upon pleading *de novo*, instead of requiring to amend. If he had done that, he would, no doubt, have obtained leave, as very little alteration was necessary to adapt his plea to the amended declaration. The plaintiff having originally sued for 85*l.*, the defendant pleaded payment of 33*3l.*; the plaintiff then obtained leave to amend his declaration, by substituting a larger amount of damages, and the defendant might easily have altered his plea by pleading a payment of 33*3l.* in bar to that sum, and as to

(*a*) 2 B. & C. 477; S. C. 3 D. & R. 647. See *Mee* v. *Tomlinson*, 1 Har. & Wol. 614; 5 N. & M. 624; *Johnson* v. *Jourdaine*, 1 Gale, 312; 2 C. M. & R. 564; 4 D. P. C. 534. *Wright* v. *Acres*, 1 Will. Woll. & Dav. 328; 1 N. & P. 761.

the rest, *non assumpsit;* the defendant however does not even now ask that, but still insists upon pleading *de novo;* he is wrong therefore in his present application, and the rule must be discharged.

As to the allowance of 3*s.* 4*d.* for the costs of attending before the judge to amend the declaration, I think it was quite sufficient

PARK, J.—I shall content myself with merely expressing my extreme surprise at the present motion, after what passed before me at chambers.

VAUGHAN, J.—It is desirable upon all occasions, to prevent expense as much as possible: the plaintiff's particulars in this case, shewed the extent of his claim, and the defendant, as it strikes me, has only attempted to increase the costs. As to the allowance of 3*s.* 4*d.* for amending the declaration, it has been urged that the judge steps out of his province in taxing costs, but the Master is only a ministerial officer of the Court, and if the judge will take upon himself the trouble of taxing the costs, there can be no objection to his doing so. The defendant has brought the inconvenience upon himself; as instead of applying to amend his plea, he has chosen to insist upon pleading *de novo*, which he had clearly no right to do.

BOSANQUET, J.—I am of the same opinion. I do not see how it can be said that a judge has no right to tax the costs, considering that the taxation by the Master is in fact the taxation by the Court.

Rule discharged.

HICKS *v.* The DUKE of BEAUFORT.

Jan. 22.

THIS was an action by the indorsee against the drawer of a bill of exchange, accepted by Lord *Foley*, which became due in *December*, 1831. The defendant had pleaded that he had received no notice of dishonour; upon which issue was taken.

At the trial before *Vaughan*, J., it appeared that the holder of the bill had called upon the defendant in *May*, 1832, for payment, who said he ought to press Lord *Foley*, the acceptor, and that if he did not pay, he, (the defendant) must; subsequent applications were proved to have been made to Lord *Foley* for payment. There was evidence also, that the defendant had endeavoured to raise money for the purpose of paying off the bill, but the negotiation had been broken off.

The learned judge told the jury, that as the defendant was the drawer, there must either be proof of notice to him of the dishonour, or of an express waiver on his part; and he left it to them to say, whether such notice had been given. The jury returned a verdict for the defendant.

Wilde, Serjt., had obtained a rule *nisi* last Term for a new trial, upon the ground of misdirection, and also upon affidavits of evidence of a notice, discovered since the trial. Upon the former point he had cited *Lundie* v.

The drawer of a bill of exchange upon being applied to by the holder for payment, some months after the bill had become due, said, "you ought to press *F.* (the acceptor), if he does not pay I must;" he afterwards endeavoured to raise money to meet the bill:—*Held*, upon an issue, whether or not the drawer had received notice of dishonour, that the above circumstances amounted, at most, only to presumption of notice, and that it was properly left to the jury to find whether or not notice had been given.

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Robertson (*a*), *Potter* v. *Raynworth* (*b*), *Taylor* v. *Jones* (*c*), *Fletcher* v. *Froggatt* (*d*), *Gunson* v. *Metz* (*e*), and *Wood* v. *Brown* (*f*).

Talfourd, Serjt., and *Petersdorff*, now shewed cause.—The question left by the judge was correct, for under the issue it would not have been competent to the plaintiff to prove a waiver of notice; the point in issue being, whether notice in fact had or had not been given; if the plaintiff meant to insist upon a waiver he ought to have replied it specially.

The cases cited on the other side were all cases of express promise; here the utmost effect that could be given to what the defendant had said, was that it amounted to an acknowledgment of liability, which was not sufficient to dispense with proof of notice. This distinction was settled in *Pickin* v. *Graham* (*g*). In that case, the drawer's managing clerk had said, "I suppose there will be no alternative but my taking up the bill, and if you will bring it to *Sheffield* on *Tuesday*, I will pay the money;" and it was *held*, that this promise did not dispense with giving due notice of the dishonour to the drawer; the same principle was recognised in *Borradaile* v. *Lowe* (*h*), *Cuming* v. *French* (*i*), *Standage* v. *Creighton* (*j*).

Wilde, Serjt., and *Bayley*, in support of the rule.—The evidence was not presented to the jury according to its legal effect; what the defendant said, amounted to more than a mere recognition of his liability, and coupled with his subsequent endeavours to raise money for the purpose of meeting the bill, it was sufficient evidence that he had received notice. In the three cases last cited, the promise proved was only conditional, and there was no evidence of the performance of the condition; but in this case, there was proof that applications *had* been made to Lord *Foley*, so that the defendant's promise became absolute. The judgment of Lord *Ellenborough* in *Lundie* v. *Robertson* (*k*), is strongly in favour of the plaintiff. Whether notice had or had not been given, was a mixed question of law and fact, and both should not have been left to the jury; whether the witness who spoke to the conversation with the defendant was to be believed, was a question of fact; but the result of that conversation was matter of law which should have been determined by the judge, *Padget* v. *Priest* (*l*).

TINDAL, C. J.—The precise question in this case is, whether or not the defendant, being the drawer of a bill of exchange, had notice of its dishonour by the acceptor. Under the new rules, it has become necessary to plead the want of notice, and that is the only issue that is raised in this action. The point for our consideration is, whether there was any misdirection on the part of the learned judge, before whom this cause was tried; I am of opinion, there was none. I look upon the cases, as carrying the doctrine to this

(*a*) 7 East, 231.
(*b*) 13 East, 417.
(*c*) 2 Camp. 105.
(*d*) 2 C. & P. 569.
(*e*) 1 B. & C. 193, S. C. 2 D. & R. 334.
(*f*) 1 Star. N. P. C. 217; See also *Jones* v. *Morgan*, 2 Camp. 474; *Ex parte Bignold*, 1 Deac. 712; 2 Mont. & Ayr. 633, and the cases there collected.
(*g*) 3 Tyr. 923; S. C. 1 C. & M. 725.
(*h*) 4 Taunt. 93.
(*i*) 2 Camp. 106, (*n*).
(*j*) 5 C. & P. 406.
(*k*) 7 East, 235.
(*l*) 2 T. R. 97.

point; that after the dishonour of a bill, there having been time for the drawer to be apprised of it, if he distinctly promise to pay it, it is evidence to go to the jury, that he had previous notice of the dishonour; for men are not prone to make admissions against their own interests: the case of *Lundie* v. *Robertson* goes no farther than this. In the present case, the bill is shewn to be in the hands of a party who had a conversation with the defendant some months after it had fallen due; but there is nothing in that conversation that amounts to a distinct promise to pay; it was evidence, however, to go to the jury, and I am not disposed to say, that if they had found a verdict for the plaintiff, they might not have arrived at a fair conclusion that he had received notice of the dishonour; but it was entirely a question for them. The counsel had a right to comment upon the evidence, and the judge to state his opinion; but I do not see any reason for objecting to the manner in which he left the case to the jury. Upon this point, therefore, I think the rule must be discharged. Upon the affidavits, however, there will be a new trial upon payment of costs.

PARK, J.—I was not in Court when this was first moved, but I have attended to the case now, and I certainly do not think that there was any misdirection on the part of the learned judge, before whom the cause was tried. It is not every strong or weak observation made by the judge in summing up which can be said to amount to misdirection. I think upon the evidence, it is very probable I should have come to a different conclusion from what the jury have done; but I do not find any thing like a misdirection. There can only be a new trial on the usual terms.

VAUGHAN, J.—I am of the same opinion. The justice of the case will be ultimately advanced, by the case going down to trial again. I say nothing on the point of misdirection; but I think the learned counsel go too far in saying, that the admission proved to have been made by the defendant, amounted to conclusive evidence of notice having been received by the defendant; it was a circumstance from which notice might be presumed, but the jury were entitled to form their own conclusions upon it.

BOSANQUET, J.—I also am of opinion that a new trial should be granted in this case, upon payment of costs. I think myself, the jury came to a wrong conclusion upon the facts; but that there was no misdirection on the part of the learned judge. The evidence amounted merely to presumption of notice, for there was no evidence of actual notice, and it was entirely a question for the jury.

Rule absolute on payment of costs.

Common Pleas.

Jan. 24.

A plea in trover, that one *J. R.* was lawfully possessed of the goods in question, and pledged them to one *T. F.* upon the discount of a bill of exchange; that *T. F* deposited them with the defendant (a warehouseman); that the bill was dishonoured, and the defendant detained the goods at *T. F's.* command:—*Held*, bad.

JAULERRY and others *v.* BRITTEN.

TROVER for 10,000 dozen cotton handkerchiefs, &c. *Third plea*, that before, &c. the defendant was a warehouseman, and kept a warehouse for the warehousing of goods for certain reward, &c. and that before, &c., to wit, on, &c. one *J. R.* was lawfully in possession of the said goods and chattels, &c., and having lawful possession thereof, heretofore and before, &c., applied to one *T. F.* to discount a certain bill of exchange, bearing date, &c., drawn by one *T. S.* on *T. D.* and Co., for, &c. on the deposit of the said goods and chattels, with the said *T. F.*, as collateral security, and guarantee for the due and regular payment of the said bill; and the said *T. F.* then agreed on such application to discount the said bill on the deposit with him, the said *T. F.*, of the said goods and chattels, &c.; and the defendant says, that thereupon the said *J. R.* deposited with the said *T. F.*, on the discount by him of the said bill, and by the direction and order of the said *T. F.*, then delivered and deposited in the warehouse of the defendant the said goods and chattels as security and guarantee, &c., and the defendant, at the request, and on the account of *T. F.*, then received the said goods by the delivery thereof by *J. R.*, for the purpose aforesaid, into the said warehouse of him, the defendant, for certain reasonable reward to be paid to him the defendant, in that behalf, by *T. F.*; and the defendant thence hitherto hath held, and at the same time when, &c., kept and detained the said goods and chattels on the said deposit and security and guarantee, and on account of the said *T. F.* as aforesaid. And the defendant further saith, that the said *T. F.* then, on the said day and year aforesaid, at the time of the said deposit, &c., and upon the security, deposit, and guarantee thereof, for the due and regular payment of the said bill, then discounted the said bill, and advanced and paid with his own proper monies a large sum of money, to wit, &c., to *J. R.* in discount of the said bill upon the deposit of the said goods and chattels, &c., with him the said *T. F.*, for the due and regular payment of the said bill in the warehouse of the defendant, on account of and for the said *T. F.* upon the said deposit and discount of the said bill. And the defendant says, that the said bill was not paid when the same became due, but was dishonoured and refused payment by the said *T. D.* and Co. when the same was duly presented for payment, to wit, &c., when the said bill became due and payable according, &c., and remains, and is dishonoured and unpaid, and the said sum of &c., so advanced by the said *T. F.* on the deposit of the said goods and chattels, remains and is unpaid and owing to the said *T. F.*; wherefore he, the defendant, at the command of the said *T. F.*, and on his account at the said times, when, &c., held and kept and detained the said goods and chattels by reason of the said deposit, and as collateral security for the due payment of the said bill, as he lawfully might, &c., which is the said supposed conversion, &c.

Fourth plea, similar to the last, but omitting all mention of *J. R.*, and stating the possession of the goods to have been in *T. S.* (the drawer of the bill), and the deposit to have been made by him, &c.

Special demurrer to the above pleas, upon the ground that they did not

shew any sufficient authority in *J. R.* or *T. S.* to make such deposit; that they amounted to the general issue, and contained only an argumentative denial of the right of possession in the plaintiffs, and of the conversion in the defendants; and upon other grounds, which it is not necessary to specify.

W. H. Watson, for the demurrer.—The pleas are no answer to the action; the plaintiffs say, that the defendant has converted their goods, and the defendant sets up as an answer, that the goods were in the possession of some other person who pledged them to him, and therefore he keeps them. This may possibly give him a right against other persons, but clearly not against the owner. A servant may be in the lawful possession of his master's horse, but he has no right to pledge it. The plaintiffs' property is not traversed, nor is any property set up in the parties pledging the goods.

He was stopped by the Court, who called on

Hoggins in support of the plea.—He relied upon the 5th sec. of the Factor's Act (*a*). The plea states, that the party making the pledge was lawfully possessed of the goods, and it must be presumed that the plaintiff, the owner of the goods, had communicated his authority to pledge them. The real question is, whether this was a valid pledge, the defendant cannot set out the relation between the plaintiff and *J. R.*

TINDAL, C. J.—But the defendant does not even state he was in the possession of the goods as factor, so as to bring himself within the terms of the Statute, or that he was entrusted with the goods to sell or pledge them.

Hoggins then craved leave to amend, by introducing an allegation that *J. R.* was entrusted with the goods as factor, upon producing an affidavit to that effect.

Granted.

(*a*) 6 *G.* 4, c. 94, by which it is enacted, "that it shall be lawful for any person to accept goods, &c. in deposit or pledge from any factor, notwithstanding such person shall have notice that the person making such deposit or pledge is a factor, but in that case *such person shall acquire no further right in the said goods than was possessed by the said factor* at the time of such deposit or pledge."

A. B. DALY, Executor, &c. *v.* MAHON.

Jan. 23.

THE plaintiff declared in *assumpsit*, as executor of *J. Daly*, deceased, with the usual *profert* of the letters testamentary of the testator. The defendant demanded "*oyer* and copy of the letters testamentary, mentioned in the declaration." The plaintiff delivered a copy of the ordinary's *certificate* in the usual form (*a*), wherein reference is made to "the last will and

The term "letters testamentary" includes as well a copy of *the will* of the testator, as *the certificate* of the ordinary; where, therefore, in an action by an executor who made *profert* of the "letters testamentary" of the deceased in the usual form, and the defendant demanded *oyer* thereof, and the plaintiff delivered a copy of such *certificate* only:—*Held*, that it was not a sufficient compliance with the demand.

(*a*) See the Form, 1 Wms. Executors, 212.

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testament *hereunto annexed*" of the testator, but *no copy of the will* was delivered. The defendant not having pleaded, the plaintiff signed judgment by default.

Hurlstone, on a former day in this Term obtained a rule *nisi*, to set aside this judgment for irregularity; he contended it was necessary to set out the *will* as well as the *certificate*, and cited 1 *Wms. on Executors*, 158, where it is laid down, that the consequence of the exclusive ecclesiastical jurisdiction is, that an executor cannot assert or rely on his right in any other Court, without shewing that he has previously established it in the spiritual Court; the usual proof of which is, the production of a copy of the will, by which he is appointed, certified under the seal of the ordinary. This is usually called the *probate*, or the *letters testamentary*."

Shee now shewed cause, and argued, that enough had been set out in this case; that it sufficiently shewed the defendant that the plaintiff was authorized to sue as executor, and that it would be an unnecessary expence to set out the whole of the will upon the pleadings; as it might be examined elsewhere.

Hurlstone in support of the rule.—If the will be not set out, the defendant would be deprived of an opportunity of pleading in abatement the non-joinder of other executors, of which omission he could not take advantage in any other way (*b*), and there would not be time to put in such plea in this case within the four days, as the will was in *Ireland*.

TINDAL, C. J.—I am of opinion, that the plaintiff has not sufficiently complied with the demand of *oyer*. He has declared, in the ordinary form, that he "brings into Court here the letters testamentary of the said *J. Daly*, deceased;" the defendant craves *oyer* of the letters testamentary, which clearly incorporate the *will*, but all that the plaintiff has set out in this case, is the *certificate* of the ordinary; and this is not a compliance with the demand of *oyer*. In *Clark* v. *Clark* (*c*), it was said by the Lord Chancellor "that the producing *letters testamentary* was sufficient, *because they imported the will*, with that further circumstance of its being under the seal of the ordinary;" and in *Hensloe's* Case (*d*), it is said, that "as to bringing of actions in the *King's* Courts, the judges do not admit the executors to sue for things in action, unless they shew *the will*, proved duly under the seal of the ordinary." The defendant, therefore, having craved *oyer* of the letters testamentary, the plaintiff was bound to set out, not only the certificate, but also a copy of the will; the only objection that has been urged against this proceeding is, that it involves the party in unnecessary expence; but inasmuch as the defendant bears that expence, the plaintiff can have no right to insist upon that as an objection. The plaintiff here has proceeded irregularly in signing judgment, not having duly complied with the defendant's demand of *oyer*, and the judgment therefore must be set aside.

The other judges concurred.

Rule absolute.

(*b*) 1 Wms. Saunders, 291, i.

(*c*) Cited in *Shepherd* v. *Shorthose*, 1 Str. 412.

(*d*) 9 Rep. 38, a.

WHITE *v.* PRICKETT.

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Jan. 23.

A defendant who seeks to recover costs under the 43 *G.* 3, c. 46, sec. 3, as having been arrested in too large an amount, is bound to shew that the plaintiff had not any reasonable or probable cause for arresting him in such amount; therefore, when a defendant being indebted partly upon a bill of exchange, and partly for goods sold (which latter claim however, was barred by the Statute of Limitations), had made several verbal admissions of his liability to the plaintiff, but afterwards successfully set up the Statute of Limitations as a defence to the action:—*Held*, that he was not entitled to his costs under 43 *G.* 3.

PETERSDORFF, on a former day in this Term, had obtained a rule *nisi*, that the defendant might be allowed his costs, under the 43 *Geo.* 3, c. 46, s. 3; upon an affidavit by the defendant's attorney, which stated that the defendant had been arrested by the plaintiff for 17*l.* 9*s.*, as drawer of a bill of exchange for that amount; and 11*l.* for goods sold; that the defendant had pleaded to the count on the bill that he had received no notice of dishonour; and to the count for goods sold, the Statute of Limitations; and that at the trial, the claim for the goods had been abandoned, and the plaintiff had recovered only upon the bill.

Wilde, Serjt., now shewed cause upon an affidavit by the plaintiff, which stated, that on four occasions, within six years, the defendant had promised to pay the debt; that the plaintiff was for some time ignorant of the defendant's place of residence; that the latter had refused to disclose it; and that the plaintiff had only discovered it by accident, a short time before the action was commenced; and that having been advised that the promise of payment not being made in writing was inadmissible in evidence, the count for goods sold had been abandoned at the trial. The learned Serjt. contended that the defence of the Statute of Limitations, was, under the circumstances of the case, a dishonest one, and the Court would not allow the defendant any further benefit from it. When a real debt is due, and the defence is discretionary on the part of the defendant, after he has made promises to pay, the plaintiff would be under no obligation to suppose that a dishonest defence would be set up. In *Spooner* v. *Danks* (*a*) it was held, that in order to entitle a defendant to costs under the Statute, he must satisfactorily shew the Court that the plaintiff had no reasonable or probable cause for the arrest; in that case, the plaintiff had arrested the defendant (a female) for 500*l.*, for money lent; she pleaded coverture, and the plaintiff recovered a verdict for 38*l.* only, for money advanced to her after her husband's death. The Court held that she was not entitled to the protection of the Statute, as it was incumbent on her to shew that the plaintiff was aware of her coverture. In this case, there was no intimation that the defendant meant to rely upon the Statute of Limitations, until the plea was put upon the record.—[*Bosanquet*, J.—Might not the same argument be used as to a release?]—In that case, the cause of action has been destroyed by the plaintiff's own act; here, the debt was honestly due, and it was in the defendant's own discretion, whether or not the plaintiff should be barred from his right of recovery.

Petersdorff, in support of the rule, admitted that it is incumbent on the party seeking relief under the Statute, to shew that the arrest was without reasonable or probable cause; but contended, that although the defence set up might be merely a technical one, that was not sufficient to prevent the defendant from insisting that he has been arrested without such cause. If the

(*a*) 7 Bing. 772; S. C. 5 Mo. & P. 701; 1 Dowl. P. C. 232.

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plaintiff arrest a debtor, relying merely on admissions which he cannot prove, or on what amounts to mere *moral* evidence of his debt, he is not justified in so doing, and the defendant is entitled to relief under the Act. In *Griffiths* v. *Pointon* (*b*), it was decided, that a party is not warranted in arresting another for a debt of which he has not, *at the time of making the arrest*, some evidence besides his own personal knowledge of its existence; and therefore, a plaintiff arresting a defendant for a large sum of money, and having, at the time of arrest, evidence only as to a small portion of the amount, was held to be liable to costs, under the Statute, although at the time of the trial, some evidence of a *subsequent* acknowledgment by the defendant was given. In that case, Lord *Denman*, C. J., said, the plaintiff "must, at the time of the arrest, have reasonable and probable cause for believing that he shall be able to prove the debt at the trial." And *Patteson*, J., observed, "I do not mean to lay down any general rule applicable to every case, but I must say, that a party ought not to arrest without having some evidence of the debt besides his own knowledge." In *Ballantine* v. *Taylor* (*c*) the defendant had been arrested for 20*l.* 2*s.* 1*d.* for goods sold; he had pleaded infancy, to which the defendant had replied, that the goods were necessaries. At the trial, the plaintiff succeeded in proving the delivery of certain articles only, in his bill of particulars, and got a verdict for 10*l.*; on an affidavit of the defendant, that he never owed the plaintiff 20*l.*, the Court gave him his costs under the Statute; notwithstanding, the plaintiff swore that all the articles in the bill of particulars were delivered to the defendant. In *Ashton* v. *Naull* (*d*) it was held, that if the plaintiff arrest a defendant for one side of a mutual account, without giving credit for what he knows to be due from himself, although the defendant has refused to deliver his account, the latter is entitled to his costs under the Statute.

The question really is, whether the plaintiff, at the time he arrested the defendant, was in possession of *legal* probable cause for so doing, and the sum recovered by the plaintiff at the trial being under the arrestable amount, is *primâ facie* evidence of want of such probable cause.

TINDAL, C. J.—I am of opinion, that the defendant has not brought himself within the operation of the 3d section of the Stat. 43 *G.* 3, c. 46. I think a defendant is bound to shew that the plaintiff had no reasonable or probable cause for arresting him, and that the *onus* does not lie on the plaintiff to shew the existence of such cause. It is not necessary, in this case, to lay down any general rule; as the ground for my opinion is, that the defendant has himself deceived and deluded the plaintiff into a belief that he did not mean to set up the Statute of Limitations as a defence to the plaintiff's claim. The plea of the Statute is an honest or a dishonest defence, according to the consciousness of the party, whether or not he has a *bonâ fide* defence to the action. It appears, in this case, that the defendant had made four distinct admissions of the correctness of the plaintiff's claim; these admissions having been made *verbally*, were not admissible in evidence, since Lord *Tenterden's* Act, but they were sufficient to deceive the plaintiff; and the defendant upon an application to the discretion of the Court, like the present,

(*b*) 2 N. & M 675.
(*c*) 1 N. & P. 219; S. C. 2 H. & W. 453.
(*d*) 2 D. P. C. 727; S. C. 3 Mo. & Sc. 184.

cannot be allowed to avail himself of his own deception. The cases which have been cited on the part of the defendant, are clearly distinguishable from the present. In *Griffiths* v. *Pointon*, the plaintiff knew he was not in a situation to prove the debt; whereas, *here*, the plaintiff would have been in such a situation if the defendant had not set up the Statute of Limitations, which the plaintiff had every reason to believe he would not do. The case of *Ballantine* v. *Taylor* stands upon its own peculiar circumstances; the defendant had been held to bail for only 2*s*. 1*d*. above the arrestable amount, and it was therefore, not a case in which the plaintiff was entitled to any extraordinary favour, and he had been previously put upon his guard by the conduct of the defendant as to the nature of the defence intended to be set up. It is sufficient, in this case, to say that a debt being really due, and the conduct of the defendant having been such as to mislead the plaintiff, with regard to his intentions to dispute his liability, he is not entitled to ask for costs under the Statute.

PARK, J.—I am of the same opinion. I cannot say that I agree with the proposition that the sum recovered by the plaintiff, is *primâ facie* evidence of want of reasonable and probable cause for arresting a defendant; but even if the proposition were correct, the evidence would have been rebutted in this case, for the plaintiff clearly shews that he had reasonable cause for arresting the defendant for the amount he did. The cases cited on the part of the defendant do not apply. *Ashton* v. *Naull* was a case of outrageous conduct on the part of the plaintiff, for he had arrested the defendant for one side only of a mutual account. His Lordship also cited *Martell* v. *Southall* (*e*).

VAUGHAN, J.—I am of the same opinion. The due administration of justice requires us to refuse the present application. It is important to look to the Act of Parliament, to see under what circumstances the Court is called upon to give relief to a defendant. Now the 3d section of the Statute enacts, "that when the defendant shall be arrested and held to special bail, and the plaintiff shall not recover the amount for which the defendant shall have been so arrested, such defendant shall be entitled to costs of suit, provided that it shall be made to appear *to the satisfaction of the Court* in which such action is brought, upon motion to be made in Court for that purpose, *and upon hearing the parties by affidavit*, that the plaintiff, in such action, had not any reasonable or probable cause for causing the defendant to be arrested and held to special bail in such amount as aforesaid." Each case, therefore, must depend on its own circumstances; the parties have an opportunity of stating their own case upon affidavit, and the Court will judge whether the defendant has shewn that the plaintiff had not any probable cause for arresting him. Now here, the plaintiff swears he had no reason to expect the defendant would set up the Statute of Limitations; he had been lulled into the belief that the defendant would not do so by his repeated admissions. The distinctions has been well put by the learned counsel for the plaintiff, between this case and that of a release, for a release operates as an extinguishment of the debt; while in this case, the debt was only barred, and might have been revived by a written admission. Upon the whole, it appears to me, it would

(*e*) 2 Bing. N. C. 74; S. C. 2 Sc. 132.

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be great injustice to the plaintiff, if we were to allow the defendant to succeed in his present application.

BOSANQUET, J.—The defendant has the burthen cast upon him of shewing want of reasonable and probable cause, on the part of the plaintiff, for making the arrest. In *Roper* v. *Shevely* (*f*) it was held, that the mere fact of a defendant being arrested for more than was recovered, is not sufficient to disentitle the plaintiff to costs under the Statute, but there must also appear to be a want of reasonable and probable cause. In the present case, the defendant himself has made no affidavit, and the plaintiff has shewn repeated promises, on the part of the defendant, to pay the debt; after which, the defendant dishonestly, as it appears to me, sets up the defence of the Statute of Limitations; this does not, therefore, appear to be a case in which he is entitled to the interference of the Court.

Rule discharged.

(*f*) 2 D. P. C. 14; S. C. *nom. Roper* v. *Sheasby*, 1 C. & M. 496; 3 Tyr. 486.

Jan. 25.

In the matter of Sir WILLIAM JERVIS TWYSDEN'S Recovery.

The Court ordered a recovery to be amended, by inserting the words "free warren;" such right having been enjoyed with the estate, since the time of *James* 1st, and having been intended to pass.

SIR *W. J. Twysden* being entitled to a right of *free warren* over the manors of *W.* and *L.* in the county of *Kent*, had suffered a recovery of all his estates in the said county. In the deed to make the tenant to the *præcipe*, the right of *free warren* was not specifically mentioned; but the deed contained the general description of "all the manors, messuages, farms, lands, wood-lands, tenements, and *hereditaments*, whatsoever, whereof, or wherein the said Sir *W. J. T.*, or any person or persons in trust for him, &c. had any estate of freehold, &c., situate, &c."

Wilde, Serjt., moved to amend this recovery, by adding the following words, "and also a *free warren* over the manors of *W.* and *L.* aforesaid, and the lands belonging to the said Sir *W. J. T.* in &c., aforesaid;" upon an affidavit, setting out the foregoing facts, and stating that it had been intended to pass such right. The term "*hereditaments*," would probably include the right of free warren, which had been in the enjoyment of the family since the grant by *James* 1, but if the estate were sold with the right of free warren, the purchaser might not be satisfied that it would pass by the present terms of the recovery. By sect. 8, of the Statute 3 & 4 *Will.* 4, c. 74, it is enacted, "that if it shall be apparent from the deed, &c. that there is in any of the proceedings of a recovery, any error in the name of the tenant, &c. or any misdescription, or omission of *lands*, intended to be passed by such recovery, the recovery, without any amendment, shall be as good and valid as the same would have been, and shall be held to have passed all the *lands* intended to have been passed thereby, in the same manner as it would have done if there had been no such error, &c." It might be doubtful, however, whether that section would apply to the present case, as the word "*lands*" is the only

term used; but by the 9th section there is a saving of the jurisdiction of any Court to make amendments in cases not provided for by the Act.

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Per Curiam.—Amendment granted (*a*).

(*a*) See *Lancaster*, demandant, *Wilmot*, tenant, and *Boone*, vouchee, 7 Taunt. 352.

BRYANT *v.* BEATTIE.

Jan. 22, 23, and 25.

THIS was a feigned issue under the Interpleader Act, directed by the Court to be tried between the parties, under the following circumstances. The plaintiff was in possession of a Hotel, situated in the county of *Middlesex*, and being desirous of parting with his interest therein, but having omitted to renew his licence, he entered into the following agreement with the defendant.

A. being the occupier of a hotel, for which he had omitted to procure the requisite licence, assigned the hotel to *B.*, and undertook to procure a licence by a certain day, or to forfeit a sum of money deposited with a stake-holder. Notice was given to both to attend before the magistrates on the licensing day, but *B.* neglected to attend; in consequence of which the licence was refused:—*Held*, that *A.* was entitled to have back his deposit money. *Held* also, that it was incumbent upon the defendant to give the notices required by the 14th sec. of the Licensing Act, 9 *G.* 4, c. 61.

"*Mem.* of an agreement made 18th *June*, 1836, between *Bryant* of the one part, and *Beattie* of the other part.

Whereas by an agreement bearing date 28th *May*, 1836, between the aforesaid parties, the said *Bryant* did agree to sell to the said *Beattie*, and the said *Beattie* did agree to purchase certain premises, therein described, as known by the name of *Bryant's Hotel*, together with certain fixtures and other things therein mentioned: and whereas the said *Bryant hath not any licences* for the retail of wine, spirits, and beer, and therefore cannot transfer such licences to the said *Beattie:* now these presents witness, and it is hereby agreed by and between the said *Bryant* and *Beattie*, that the said *Bryant* shall deposit in the hands of one *S. Wright* 150*l.*, *to secure the taking out of such licences*, for the retail of all the said liquors. And the said *Bryant* doth hereby agree with the said *Beattie, that he will on the* 16*th of August*, now next ensuing, *take*, or cause to be taken *out, the proper licences*, for the retail of the said liquors, *either in the name of the said Beattie, or the said Bryant.* And in either case, that he will forthwith transfer such licences to the said *Beattie*; and further, *if the same be not done*, so that the said *Beattie* shall be in a situation to enjoy the full benefit of such licences, *before the* 31*st of October* next, then *the said Bryant shall forfeit and pay to the said Beattie the said sum of* 150*l.*, which it shall be lawful for *Beattie* to receive from the said *S. Wright.* And further, *if the said licences shall be procured*, and assigned as aforesaid, *and the said Beattie shall* exert himself, *and be put unto any expences in procuring the same*, and the transfer thereof by the time last aforesaid, the said *Beattie* shall be at liberty to demand from the said *S. Wright, and the said S. Wright is hereby empowered to pay to the said Beattie, out of the* 150*l.*, *all such expences* occasioned by the said *Beattie* as aforesaid, and also all expences occasioned by this agreement. And it is further agreed between the said *Bryant* and *Beattie*, that in the event of the said licences not being obtained by the said 16th *August*, but before the 31st of *October*, then the said *Bryant* agrees to allow 5*s.* per week to the said *Beattie*, as a remuneration for the loss occasioned by not obtaining the licences by the

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said 16th *August*, from the date hereof till the said 31st of *October*, to be paid by the said *S. Wright*, out of the 150*l.* As witness, &c.

(signed by "*Bryant* and *Beattie*.")

The sum of 150*l.* had been deposited in the hands of *S. Wright*, in pursuance of the above agreement. Notice was given to both the plaintiff and defendant, by the magistrates' clerk, that it would be necessary for them both to attend before the magistrates on the 16th of *August*, in order to obtain a licence for the premises; the plaintiff attended accordingly, but the defendant did not come to the place appointed, till the magistrates had separated, and no licence was obtained on that day; the magistrates however had previously told the plaintiff, that if the defendant had been present, they would have granted the licence.

There was no licensing day between the 16th of *August* and the 31st of *October*, but on the following 15th of *November*, the defendant having previously given the proper notices, obtained a licence.

The question raised by the issue was, whether the plaintiff was entitled to the said sum of 150*l.* or to any part thereof; and the plaintiff at the trial recovered a verdict for the whole amount, the jury having expressly found *that it was owing to the absence of the defendant that the licence was not obtained* on the 16th of *August*; leave however was reserved to the defendant, to move to set aside the verdict and enter a nonsuit.

Atcherley, Serjt., had obtained a rule *nisi*, accordingly, on the ground, that according to the express terms of the agreement, the plaintiff himself was bound to obtain the licence at any rate before the 31st of *October*; that upon his failure to do so, the money deposited in the hands of *Wright* was absolutely forfeited, as the defendant had not undertaken to take any steps to obtain the licence; and also, that even if the defendant had attended the magistrates, under the Licensing Act, 9 *G.* 4, c. 61, would have had no power to grant the licences, in the absence of the proper notices required by the Act (*a*).

(*a*) By sec. 1 of 9 *G.* 4, c. 61, (the Licensing Act), general licensing meetings are to be held annually by the justices, and the time of holding such meetings is fixed. By sec. 4, the justices are to appoint from four to eight special sessions in the year for the purpose of *transferring* licences, from parties who have already had them granted, to others. By sec. 9, "any question touching the granting, withholding, or transferring any licence," &c., is to be determined by the majority of the qualified justices present at the meeting. By sec. 10, "every person intending to apply for a licence, &c. in any house *not heretofore kept* as an inn, shall affix, &c. a notice on the door of such house, and on the door of the church, &c. of the parish, &c., in which such house shall be situate, &c., on three several Sundays, &c., and shall serve a copy of such notice upon one of the overseers of the poor, &c., &c., according to the form in the schedule marked A." By sec. 11, a similar notice must be given by every person "holding a licence, being desirous to *transfer* such licence to some other person, according to the form in the schedule marked B." By sec. 12, if any person, *intending to apply for a licence*, or for the transfer of a licence, shall be hindered by any reasonable cause from attending in person at any licensing meeting, he may authorize any other person to attend for him." By sec. 14, it is enacted "that if any person duly licensed, shall die, or shall by sickness, &c. be rendered incapable of keeping an inn, or shall become bankrupt, &c., or if any person so licensed, or the heirs, &c., shall remove from or yield up the possession of the house specified in such licence, or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have *neglected to apply for a licence*, &c., it shall be lawful for

Bompas, Serjt., and *Butt*, now shewed cause.—They submitted, that upon the true construction of the Act, it would have been competent to the magistrate to grant the licence, if the defendant had attended; there was no proof that the requisite notices had not been given, and the Court would not assume that such was the case, as the magistrates had stated that the licence would have been granted if the defendant had attended; besides, whatever notices were requisite, it appears by the 14 sec. of the Act, to have been the defendant's duty to have given them.

Then the case amounted to this, that the defendant, by his own neglect or default, had prevented the plaintiff from carrying the contract into effect, although the plaintiff was shewn to have been willing to do so, and the defendant could not avail himself of his own default. In *Co. Lit.* 206, b. it is laid down, "If a man make a feoffment in fee, upon condition that the feoffee shall re-enfeoff him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force, until the day be passed, the state of the feoffee is absolute, for the feoffor is the cause, wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof." So in *Com. Dig.* tit. *Condition* (L. 5,) it is said "The performance of a condition shall be excused by the absence of the feoffee or obligee, *when his presence was necessary for the performance.*" In *Jones* v. *Barkley* (*b*), it was held, that when something is covenanted or agreed to be performed by each of two parties, at the same time, he who was ready and offered to perform his part, but was discharged by the other, might maintain an action against the other for not performing his part. And in *Kingston* v. *Preston* (*c*), Lord *Macclesfield* distinguished covenants into three kinds; *first*, mutual and independent; *second*, dependant; and *third*, mutual, and to be performed at the same time; and in these latter, his Lordship observed (*d*), "if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered, has fulfilled his engagement, and may maintain an action for the default of the other:" now in the present case, the conduct of the plaintiff in attending before the magistrates,

the justices at a special session, &c. to grant to the heirs, &c. of the persons so dying, or to the assignees of such person so becoming incapable of keeping an inn, or to the assignees of such bankrupt, &c., or *to any new tenant* or occupier of any house having so become unoccupied, or to any person to whom such heirs, &c. shall by sale or otherwise have *bonâ fide* conveyed or otherwise made over his or their interest in the occupation and keeping of such house, &c. &c. *Provided*, that every person *intending to apply* in any of the above mentioned cases, at any such special session for a licence, &c., shall on some one *Sunday* within the six weeks next before such special session, &c., affix on the door of such house, &c. such and the like notice as is hereinbefore directed to be affixed by every person intending to apply at the general annual licensing meeting for a licence, &c." The form A. given in the schedule above referred to, is as follows: "I, *A. B.* &c.,(stating trade, residence, &c.) do hereby give notice, that (if *application is intended to be made to a special session, here state the cause for such application,*) it is *my* intention to apply at the special session to be holden, &c., for a licence, &c., in the house, &c., (*here describe the house, &c.*) and which *I intend to keep as an inn*, alehouse, or victualling-house." The form B. is to this effect, "I, *A. B.* (or we, the executors, &c.) victualler, being authorized by virtue of the licence granted to me, &c., to sell exciseable liquor by retail, &c., do hereby give notice that it is my intention to apply, &c., for permission to transfer the above mentioned licence to *C. D.*, &c. &c.

(*b*) 2 Doug. 684.
(*c*) Cited *ibid*, 689.
(*d*) p. 691.

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shewed that he was ready and willing to perform his part of the agreement, and if the action had been framed in *assumpsit* upon the agreement, such conduct would have been sufficient to satisfy the averment in the declaration, that he was "ready and willing and offered to perform the agreement in all things on his part to be performed," and such an averment is equivalent to an allegation of performance, *Ferry* v. *Williams* (*e*). It was clearly the intention of the parties, that each of them should do all in his power to obtain the licence.

Atcherley, Serjt., and *Petersdorff*, in support of the rule.—It may be admitted, that if the plaintiff did not obtain the licence by reason of the defendant's *misconduct*, either wilful or negligent, the former would be entitled to recover the money deposited; but there is no evidence of misconduct on the part of the defendant. Granting that he had received notice to attend before the magistrates, and did not attend; still, as he was under no obligation, imposed either by law or by the terms of his agreement with the plaintiff, to appear before the magistrates, his non-attendance was no misfeazance on his part, and the plaintiff cannot avail himself of it. The plaintiff expressly agrees with the defendant, that he, the plaintiff, *will* on or before the 16th of *August, take out the proper licences, either in the defendant's name or his own*, and that if the same be not done, that he, the plaintiff, shall forfeit and pay to the defendant, the sum of 150*l.*; this is an express convention between the parties, and the plaintiff cannot get rid of it, by saying that the defendant omitted to do something which he nowise undertook to do. In the first place, even if the defendant had attended on the 16th of *August*, it would not have put the plaintiff in a better situation; for the magistrates could not have granted the licence without proof of the requisite notices having been given; and when they said they would have granted the licence if the defendant had been present, they must be presumed to have meant, they would have done so, upon the plaintiff's satisfying them, that such notices had been given. The Act of Parliament in question does not relate to fiscal matters merely, but to regulations of police; the notices required by the Act, are to be given, not to the magistrates, but to the public; it is therefore the more important that they should not be dispensed with. The Act does not require the attendance of the transferree before the magistrates; it provides for two cases, namely, *new* licences, and *transfers* of *old* licences; this is one of the latter cases, and it is governed by the first clause in the 11th sec. and the 2d in the 14th. As the parties were not before the magistrates at the general licensing meeting, in *March*, under the 1st sec., it was requisite that the notices should be given; and the form of the application is set out in the schedule B. The magistrates could not depart from the rules prescribed by the Statute; if they had done so, and granted a licence, it would have been in fact inoperative, *Davison* v. *Gill* (*f*), and it would have been the same as if no licence had been granted; so that the party who obtained it, would have no advantage from it, *Cope* v. *Rowlands* (*g*); and it might even be a question, whether a party acting under such a void licence, would not have been liable to penalties, *Rex* v. *Bryan* (*h*). The plaintiff has therefore undertaken to

(*e*) 8 Taunt. 62; S. C. 1 Moo. 498.
(*f*) 1 East. 64.
(*g*) 2 M. & W. 149; S. C. 2 Gale, 231.
(*h*) Andr. 81; Cald. 305, note 10; *Paley* on Convictions, 52.

perform an act, the execution of which either depended upon himself (by giving the proper notices), or was by law impossible, but in either case, he must take the consequences, and cannot fly from his own contract. In *Com Dig.* tit. *Condition* (D. 1), it is laid down, "If the condition to an obligation, recognizance, &c., be *impossible* at the making, the obligation is single." In *Hadley* v. *Clarke*, (*i*), the defendant had contracted to carry the plaintiff's goods from *Liverpool* to *Leghorn*; on the vessel's arriving at *Falmouth*, in the course of her voyage, an embargo was laid on her "*until the further order of Council*," and it was held, that such embargo only suspended, but did not dissolve the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages, for the non-performance of their contract. In *Paradine* v. *Jane* (*j*), cited by *Lawrence*, Justice, in *Hadley* v. *Clarke*, this distinction is taken, "when the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him; but when the party by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, *notwithstanding any accident by inevitable necessity*, because he might have provided against it by his contract."

TINDAL, C. J.—I am of opinion that the rule to enter a nonsuit must be discharged. It appears to me that too much has been assumed on the part of the defendant, in arguing this case upon the hypothesis, that the requisite notices had not been given. There was no evidence whatever that such was the fact; on the contrary, the presumption is the other way; for the magistrates declared, that if the defendant had been present, the licence would have been granted; and the Court cannot, as has been said, assume that the magistrates would have acted contrary to their duty, and have granted the licence if the necessary preliminaries had not been complied with. Upon the state of the evidence, therefore, we have no right to assume the want of the notices. But supposing none had been given, and that the magistrates would consequently have had no authority to grant the licence, still, looking at the agreement, and the provisions of the Act of Parliament, I am of opinion, that the duty of giving the requisite notices was cast upon the defendant, as being the party who sought to obtain the licence. This is not the case of a *transfer* of a licence; for the plaintiff had none to transfer: that fact is recited in the agreement. It is then the case of a new licence for a house which had formerly possessed one, and as such, falls within the provisions of the 14 sec. [His Lordship here read the 14 sec. of the stat.] The form in the schedule referred to in that section, clearly shews that the notice is to be given by the incoming tenant; for it alludes to specific matters, which could not be in the knowledge of the old tenant.

Then the case amounts to this, that the defendant, by his own wilful negligence, in not attending before the magistrates, has prevented the agreement being carried into effect; and it would be, not only contrary to the cases that have been cited, but also against all principle, to hold, where there is a condition to be performed, and the party who is to be benefitted by the contract, by his own fault renders the performance of the condition impossible, that he

(*i*) 8 T. R. 259. (*j*) Aleyn. 27.

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should avail himself of the breach of such condition. It is laid down in *Com. Dig.* tit. "*Condition*" (L. 4.) "that the non-performance of a condition may be excused by the default of the feoffee or obligee," and that principle applies to the present case (*k*).

PARK, J.—It is clear, that this is not the case of a *transfer* of a licence; if it were, the form given in schedule B. would have been applicable; but the plaintiff, in this case, had, in fact, no licence that he could transfer. It was necessary to obtain a fresh licence, and to such a state of things, the form given in schedule A. is peculiarly applicable; and it is clear, that such notice is to be given by the party who wishes to have the licence himself; for the notice runs in these words: "I, *A. B.*, &c., give notice, that it is *my* intention to apply for a licence for such and such a house, which *I* intend to keep as an inn." I am also clearly of opinion that the rule must be discharged on the other point, for the reasons already given by my Lord.

VAUGHAN, J.—I am of the same opinion; and I am glad to say, that in this instance, honesty and the law of the case concur. The state of the facts is simply this:—the plaintiff was the occupier of a hotel, which had formerly been licensed; but the plaintiff had omitted to renew such licence. The defendant was quite aware that the plaintiff had no licence to transfer. The plaintiff undertakes to procure the proper licence, and deposits 150*l.* in the hands of *Wright*, as a security that he will do so. It was clearly the understanding between the parties, that something was to be done by the defendant; for there is an express provision, that *any expences that he may be put to in procuring or endeavouring to procure the licences, are to be allowed him out of the deposit money.* Then upon the construction of the Act, I think it is equally clear, that it was the defendant's duty to give the requisite notices. If the magistrates had granted a licence, without the necessary preliminaries having been complied with, I am not prepared to agree with the position taken by the defendant's counsel, that such licence would have been so completely null and void, as to render the parties acting under it liable to penalties. I think he would be considered to be protected by the existence of a licence *in fact:* but upon this point it is not necessary to give any decided opinion. One method of testing the present question would be, to suppose an action brought by the defendant against the plaintiff for a breach of the agreement; I think it is clear, that, under the circumstances, such an action could not be maintained.

BOSANQUET, J.—I am of opinion, that the plaintiff is entitled to retain his verdict, upon this short and simple ground, that the performance of the agreement has been rendered impossible by the defendant's own act; the consideration upon which the money was to have been paid over by the stakeholder to the defendant, has therefore failed, and the plaintiff has a right to recover the money. By the agreement, the plaintiff undertakes to take out the licence, but in order to enable him to do so, it was necessary for the de-

(*k*) See also *Hotham* v. *The East India Company*, 1 T. R. 638, 645, where it was held, that if the performance of a condition is prevented by the neglect and default of the other party, that is equal to a performance.

fendant to co-operate with him; and as the defendant has refused his assistance, he cannot set up the result of his own default as a breach of the contract on the part of the plaintiff. I conceive the distinction to be clearly established, that if a party undertakes with another for the act of a third person who does not perform the act, still, the first mentioned party is liable for the breach of his undertaking; but if the non-performance arises from the act or omission of the other contracting party, in that case, the first mentioned party is not liable.

Rule discharged.

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Jan. 24.

A. entered into a written agreement *inter partes*, with *B.* and *C.* (who were described therein as co-partners), to serve them for seven years, *D.* at the time being a dormant partner: —*Held*, that *A.* could not sue *D.* for a breach of such agreement.

SPECIAL *assumpsit*. Declaration, that before and at the time of making the memorandum of agreement hereinafter mentioned, the plaintiff was in the service and employ of the defendants as their foreman, carrying on their trade and business of type founders, stereotype founders, and letter-press printers, which the defendants then used, exercised, and carried on, but without any permanent engagement; that he and the defendants were desirous of continuing their connection together for a certain period or term, to wit, the term or period of seven years from the 23d of *October*, 1834; and thereupon, on, &c., by a certain memorandum of agreement then made and entered into *between the defendants of the one part*, and *the plaintiff of the other part*, and bearing date a certain day and year therein mentioned, to wit, &c.; the plaintiff, for the consideration thereinafter mentioned, did agree to and with the defendants, *and the survivor of them*, that he would well and faithfully serve the defendants, *and the survivor of them*, for and during the term of seven years, to commence and be computed from the day of the date of the said memorandum of agreement, as their foreman, in the management and carrying on their trade, and would not during the said term of seven years be engaged or concerned in the same or any other trade or business, either on his own account, or on account of or for the benefit of any other person whatsoever, other than the defendants and the survivor of them, without the consent of the defendants or one of them in writing, first had and obtained for that purpose; that the defendants thereby, for the consideration aforesaid, by the said memorandum of agreement for themselves and the survivor of them, agreed to and with the plaintiff, that they or the survivor of them would employ the plaintiff as their foreman, in the carrying on, managing, and conducting the said trade during the said term of seven years, if the defendants, or either of them should so long live, and the plaintiff should well and faithfully observe and keep the covenants or agreements hereinbefore on his part contained; and that the defendants or the survivor of them would pay to the plaintiff wages after the rate of 3*l.* 3*s.*, of lawful money weekly. And it was by the said memorandum of agreement, further mutually agreed and declared by and between the parties thereto, that in case either of the parties should not well and truly observe, keep, and perform the agreements therein on their respective parts contained, then the party so failing or making default, should pay to the other of them the sum of 500*l.*, by way or

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in the nature of specific damages. *Mutual promises; averment,* that the plaintiff entered into the service and continued in it till *July,* 1836; *breach,* that the defendants not regarding the said memorandum of agreement, nor the said promise, did not nor would employ the plaintiff, or suffer or permit him to remain in their service as their foreman, in carrying on, managing, and conducting their said trade, during the residue of the said term of seven years, or any part of such residue, but wholly refused so to do; and on the 31st of *July,* 1836, wrongfully and unjustly, and without any reasonable or sufficient cause, and without the licence and consent, and against the will of the plaintiff, dismissed and discharged him from their service as their foreman, contrary to the form and effect of the said memorandum of agreement, and the promise and undertaking of the defendants, so made as aforesaid; whereby they became liable to pay, and ought to have paid to the plaintiff the said sum of 500*l.*, in the said memorandum of agreement mentioned, and thereby fixed and agreed on as specific damages on such breach and default as aforesaid.

Plea: (by the defendant *Drake*) that before and at the time of the making of the said supposed agreement in the declaration mentioned, the defendants and one *J. Surgey,* were united in co-partnership by and under the name, style, and firm of *William Moxey Knight and Company,* and by and under that name and style, used and exercised the trade and business of type founders, stereotype founders, and letter-press printers: that the said defendant *Knight* and *J. Surgey,* during all that time were the ostensible partners in the said firm; that the said defendant *Drake,* during all that time, was a secret partner in the said firm, and was not known as, or reputed to be, a partner in the said firm; and that at the time of making the supposed agreement in the declaration mentioned, the plaintiff did not know nor was he in any manner aware that the said defendant *Drake* was a partner in the said firm, but the plaintiff then believed and supposed that the said defendant *Knight* and *J. Surgey,* were the only parties constituting the said firm of *W. M. Knight and Company,* and the plaintiff then entered into the said supposed agreement in the declaration mentioned, under such belief and supposition, and thereby contracted with the said defendant *Knight* and *J. Surgey* alone, and on their credit, and not with the said defendant *Drake,* or on his credit; and the said defendant *Drake* averred, that the said memorandum of agreement in the declaration mentioned was in the words and figures following; that is to say: Memorandum of an agreement made and entered into this 23d day of *October,* 1834, between *William Moxey Knight,* and *John Surgey,* of *Bishop's Court, Old Bailey,* in the city of *London,* type founders, stereotype founders, and letter-press printers, and co-partners *of the one part,* and *Daniel Beckham* of the same place, *of the other part.* Whereas, the said *D. Beckham* hath been for some time in the employment of the said *W. M. Knight* and *J. Surgey,* as their foreman, in the carrying on the said trade of type founders, stereotype founders, and letter-press printers, and the said parties to these presents are mutually desirous of continuing their connection together for the term of seven years, from the date of these presents. Now these presents witness, that the said *D. Beckham,* for the considerations hereinafter mentioned, doth hereby covenant and agree to and with the said *W. M. Knight* and *J. Surgey,* and the survivor of them, in manner following, that is to say, that he the said

D. Beckham shall and will well and faithfully serve the said *W. M. Knight* and *J. Surgey, and the survivor of them*, for and during the said term of seven years, to commence and be computed from the day of the date of these presents, as their foreman, in the management and carrying on their said trades of letter-type founders, stereotype founders, and letter-press printers, and shall and will to the best of his power promote and advance the success and prosperity of the said *W. M. Knight* and *J. Surgey*. And also that he the said *D. Beckham* shall not nor will during the said term of seven years, be engaged or concerned in the same or any other trade or business, either on his own account or of or for the benefit of any other person whatsoever, other than the said *W. M. Knight* and *J. Surgey*, and the survivor of them, without the consent of the said *W. M. Knight* and *J. Surgey*, or one of them in writing, first had and obtained for that purpose. And the said *W. M. Knight* and *J. Surgey*, for the considerations aforesaid, do hereby for themselves and the survivor of them, covenant and agree to and with the said *D. Beckham*, that they the said *W. M. Knight* and *J. Surgey*, or the survivor of them, shall and will employ the said *D. Beckham* as their foreman in the carrying on, managing, and conducting the said trades of type founders, stereotype founders, and letter-press printers, during the said term of seven years, if the said *W. M. Knight* and *J. Surgey*, or either of them should so long live, and the said *D. Beckham*, shall well and faithfully observe and keep the covenants or agreements hereinbefore on his part contained, and that the said *W. M. Knight* and *J. Surgey*, or the survivor of them, shall and will pay to the said *D. Beckham* wages after the rate of 3*l.* 3*s.* of lawful money weekly. And it is hereby mutually agreed and declared by and between the said parties hereto, that in case either of the said parties shall not well and truly observe, perform, and keep the covenants and agreements herein on their respective parts contained, that then and in such case, the party so failing or making default shall and will pay to the other of them the sum of 500*l.* by way or in the nature of specific damages. In witness whereof, the said parties to these presents, have hereunto set their hands the day and year first above written. *W. M. Knight, John Surgey, Daniel Beckham.* Witness, *J. R. Barrett, Frederick's Place, Old Jewry, London*, Solicitor." And the said defendant *Drake* further averred, that there never had been any contract or agreement with the plaintiff, for the services of him the plaintiff, for the said period of time, or in manner in the said declaration mentioned, other than and except the said agreement thereinbefore particularly set out; without this, that the said defendant *Drake* promised in manner and form as in the declaration was alleged, and of that the said defendant *Drake* put himself upon the country, &c.

General demurrer and joinder.

The marginal notes to the demurrer book were as follows:—The matters of law intended to be insisted upon, as shewing that the first plea is in law, are that the agreement mentioned in the first account is, and is admitted to be an agreement respecting the trade and business of type founders, stereotype founders, and letter-press printers; that the defendant *Drake* has in his first plea admitted that at the time the said agreement was entered into, he was a dormant partner in the said concern, and that the plaintiff did not at the time of making the said agreement know nor was in any manner aware that the defendant *Drake* was a partner, and the defendant

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Drake has thereby admitted his liability upon and under the said agreement, inasmuch as by law, a party who has entered into a contract with or given credit to a firm in which there was a dormant partner, at the time of entering into such contract, or giving such credit, may on the subsequent discovery of that fact, sue such dormant partner, jointly with those who ostensibly formed the partnership, at the time of entering into such contract, or giving such credit, and with whom he contracted in ignorance of the existence of such dormant partnership; and the defendant having admitted himself to be a dormant partner, has thereby admitted his liability upon all contracts relating to the partnership concern, entered into by the ostensible partners with a third party, stranger at the time to such dormant partnership.

The matters of law intended to be argued on the part of the defendant *Drake* are, 1, That the contract particularly set forth in the plea, is admitted to be the contract on which the action is brought, and that such contract is personal to those who were actually parties thereto, and did not enure to bind the defendant *Drake*. 2, The contract is untruly set out in the declaration.

Stammers, (with whom was *Wilde*, Serjt.,) in support of the demurrer.—The plea is no answer to the action; it shews that the defendant *Drake* was a dormant partner with the other defendant *Knight*, and one *Surgey*, and that a contract was entered into, between the plaintiff on the one part, and *Knight* and *Surgey* on the other, which had relation to partnership purposes; upon which contract the plaintiff now sues, having discovered that the defendant *Drake* was a dormant partner.—[*Tindal*, C. J.—*Surgey* is not joined in the action?]—He could not be found; the defendants have not pleaded in abatement, and do not therefore seek to take advantage of his omission. A party entering into a contract with a partnership, and afterwards discovering a dormant partner, may sue him. The rule is thus laid down by *Mansfield* Chief Justice, in this Court, in *Lloyd* v. *Archbowle* (*a*), "There is a material distinction between the case where partners are defendants, and where partners are plaintiffs: if you can find out a dormant partner defendant, you may make him pay, because he has had the benefit of your work; but a person with whom you have no privity of communication in your contract, shall not sue you." In *Ex parte Gellar* (*b*), the case was this, *Sill* and *Watson*, trading under the firm of *Sill* and *Co.*, agreed with *Hutchinson* to purchase goods on a joint account; the goods were purchased by *Sill* and *Co.*, and *Hutchinson* paid them for his share; *Sill* and *Co.*, without the consent of *Hutchinson*, deposited the goods with *Gellar*, who advanced money on them, and, ignorant that *Hutchinson* was concerned in them, debited *Sill* and *Co.* with the advances; the goods were sold at a loss; a commission issued against *Sill* and *Watson*, and another against *Hutchinson*: it was *held*, that *Gellar* was entitled to prove his balance beyond the proceeds, against the estate of *Hutchinson*, as well as against the estate of *Sill* and *Watson*; and *Eldon*, C., said, in giving judgment, "*Hutchinson* must be liable for the loss, if he were to have shared in the profits. I think this transaction binds the three, whether the petitioners knew any thing of *Hutchinson* or not, *he had an interest which made him liable to this engagement.* It is the consequence

(*a*) 2 Taunt. 324. (*b*) 1 Rose, 297.

of a person suffering others to deal impliedly with his name, under the general designation of a company." The cases of *South Carolina Bank* v. *Case* (*c*), and *Vere* v. *Ashby* (*d*), are also in point (*e*). The former case, to adopt the language of *Park*, J., in *Vere* v. *Ashby* (*f*), "shews, that if a firm, consisting of several, carrying on business in the name of one of the partners, the whole firm will be bound by acts done by him, as representing the firm." So in *De Mautort* v. *Saunders* (*g*), the same learned Judge thus lays down the rule (*h*), "If a person contract with two others, he may sue them only; if after the contract be made, he discovers that they had a secret partner, who had an interest in the contract, he is at liberty to sue that secret partner jointly with them;" and in a note, appended by the reporter to that case, reference is made to *Ex parte Hamper* (*i*), and *Ex parte Norfolk* (*j*), in both of which cases, Lord *Eldon*, C., recognized the same principle.—[*Tindal*, C. J.—The general doctrine is clearly with you, but the question here is, whether an ostensible partner can bind a dormant partner, by a contract, not exactly of bargain and sale, but for something collateral.—*Bosanquet*, J.—Is it not in the nature of a mere personal contract between the parties?]—It is a contract for services to be performed by the plaintiff, which has reference to the partnership affairs. The principle therefore of the cases cited, will strictly apply to this.

As to the second point, *viz.*, whether the contract is truly set out in the declaration, it is sufficient if it is set out according to its *legal effect*, and it need not be set out in its *precise terms*: *Stephen* on *Pleading*, 432 (*k*), 1 *Chitty* on *Pleading*, 266 (*l*), *Stroud* v. *Lady Gerrard* (*m*). In *Ankerstein* v. *Clarke* (*n*), it was held, if a bond be given to husband and wife administratrix, the husband alone may declare on it, as on a bond made to himself. So in *Arnold* v. *Revoult* (*o*), in a covenant on a lease for not repairing, the instrument was described in the declaration to be made by the plaintiff, of the one part, and the defendant of the other part. On the production of the lease in evidence, it appeared to have been made between the plaintiff and his wife, of the one part, and the defendant of the other part: it was held, that this was no variance, although the premises demised, were the property of the wife before marriage.—[*Tindal*, C. J.—In this case, the contract is in these terms, the plaintiff agrees with *Knight* and *Surgey, and the survivor of them*, that he will well and faithfully serve them *and the survivor of them*, during the term of seven years: do you contend that this would enure as a contract, to serve for the survivorship of all the three partners?]—Such is submitted to be the legal effect of the instrument; although it is not so expressed in terms: it is in effect, an agreement with the three. If there had been an express stipulation that the plaintiff should not be the servant of the third partner that probably would have precluded him from suing the third partner, but that is not the case before the Court. The plaintiff, at the time he entered

(*c*) 8 B. & C. 427; S. C. 2 M. & R. 459.
(*d*) 10 B. & C. 288.
(*e*) See also *Lloyd* v. *Ashby*, 2 C. & P. 138; 2 B. & Ad. 23.
(*f*) 10 B. & C. 293.
(*g*) 1 B. & Ad. 398.
(*h*) p. 401.
(*i*) 17 Ves. 403.
(*j*) 19 Ves. 455.
(*k*) 2d edit.
(*l*) 4th edit.
(*m*) 1 Salk. 8.
(*n*) 4 T. R. 616.
(*o*) 1 B. & B. 443; S. C. 4 Moo. 66.

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into the contract, might have believed there were only two partners in the business, but he afterwards discovers a third party, who has been receiving the benefit of his skill, and he is entitled to sue him accordingly.

Stephen, Serjt. (with whom was *E. V. Williams*), *contrà*.—The real question in this case is, whether a man is to be held liable upon a written contract, in which neither his name is mentioned, nor that of any firm of which he is a partner. It is not disputed that when goods are sold, or services rendered, *to a firm*, and a dormant partner is subsequently discovered, he may be sued in respect of such sale or services: but this is quite a different case. The principle is clear, that no man can be sued upon a contract to which he is not a party, either in fact, or by implication of law. Where a party has the benefit of a contract, the law implies a contract on his part; but here there is an express contract reduced into writing, and made *inter partes*; and it is clear from that contract, the intention of the parties was, that it should be a mere *personal* contract between them. There is a total want of mutuality between the plaintiff and the defendant *Drake*. In *Siffkin* v. *Walker* (*p*), it was ruled, that if a promissory note appears on the face of it, to be the separate note of *A.* only, it cannot be declared on as the joint note of *A.* and *B.*, though given to secure a debt for which *A.* and *B.* were jointly liable; and Lord *Ellenborough*, C. J., there said, "the import and legal effect of a written instrument must be gathered from the terms in which it is expressed; and I must treat this note as a separate security for a joint debt." Again, in *Emly* v. *Lye* (*q*), where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker, through the medium of the same agent who procured the discount of other bills drawn in the partnership firm with the same banker; it was held, that the latter had no remedy against the *partnership*, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills; *though the proceeds were carried to the partnership account*; and though the banker conceived at the time, that all the bills were drawn on the partnership account. In the present case, it cannot be denied, that it was competent to the plaintiff to make an arrangement to enter into the service of *Knight* and *Surgey* only; and if such had been his intention, it is difficult to conceive any terms by which it could have been more clearly expressed than those adopted in this agreement. In the case of *The Carolina Bank* v. *Case*, the firm was represented in *America* by the name of one of the parties only; that party, therefore, had clearly a right to bind the whole firm; but there is no party here so situated, nor does it appear upon the face of the contract, that it was entered into with *Knight* and *Surgey* as members of a firm. In *Norton* v. *Herron* (*r*), the defendant by a written agreement, expressed to be made by himself on behalf of *A. B.*, of the one part, and the plaintiff, of the other part, stipulated to execute a lease of certain premises to the plaintiff. These premises were proved to belong to *A. B.*: but it was held that the defendant was personally liable. It is said, that the effect of the contract is, that the service of the plaintiff was to last during the life time of the three partners. If that were so, why is it not so laid in the declaration? The parties to the agreement are

(*p*) 2 Camp. 308.
(*q*) 15 Ea. 7.
(*r*) Ry. & Moody, 229

bound to each other, for the performance of it, in a penalty of 500*l*. Now, a dormant partner is never liable for a penalty to which the firm have made themselves liable; that is decisive of the present question. In *Lloyd* v. *Archbowle*, it was held, that a dormant partner, not privy to a contract, could not sue upon such contract; and the same principle had been previously established in *Mawman* v. *Gillett* (*s*). If therefore, a dormant partner cannot sue under such circumstances, there is no reason why he should be held liable to be sued.

Stammers in reply.—By the terms of the agreement, the services are to be rendered to the partnership, and the two partners therefore, who signed, could bind the dormant partner. In *Sandilands* v. *Marsh* (*t*), *Abbott*, C. J., said, "It has undoubtedly been held, that in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners." In *Ex parte Bolitho* (*u*), Lord *Eldon*, C., says, "If *A.* and *B.* are partners, and also separate traders, and *A.* draws a bill and indorses it in his own name, and *B.* also indorses it, and they become bankrupts, what is there to prevent the holder of a bill from proving against the separate estate of each of them? and unless you can show, that when *A.* drew the bill, he drew it not as *A.*, but as *A.* and *B.*, there can be no legal contract upon the bill as against the two. *There may be a right of action, if you can bring it to this, that the money was raised by* A. *and* B. *for partnership purposes.*" The authority of *Emly* v. *Lye*, must be considered as very much weakened by the subsequent decision in *The South Carolina Bank* v. *Case*. With regard to the agreement, that a firm cannot bind a dormant partner in a penalty, it is sufficient to say, that in the present agreement it is expressly stipulated, that the sum of 500*l*. is to be paid by the party making default, "by way of or in nature of *specific damages*," and therefore, not as a penalty. As to the want of mutuality between the parties, the same argument would apply in many cases, in which there is no doubt that an action might be maintained; as in the case of an infant's contract (*v*), or under the Statute of Frauds, when only one party signs (*w*), or in the case of Sunday Trading, *Bloxsome* v. *Williams* (*x*). In *Cothay* v. *Fennell* (*y*), it was held, that a dormant partner might sue, and the Court thus laid down the rule: "It is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made. In *Young* v. *Hunter* (*z*), *Gibbs*, C. J., puts one special instance to the contrary; but that does not govern the present case; and a dormant partner in one instance, may sue as well as a dormant partner in the general business of a mercantile house." The objection that this is an agreement *inter partes*, has been anticipated, by shewing that an instrument is to be set out according to its *legal effect*, and by the cases of *Angerstein* v. *Clarke*, and

(*s*) 2 Taunt. 325, a.
(*t*) 2 B. & A. 673.
(*u*) Buck, 100.
(*v*) See *Holt* v. *Ward*, 2 Str. 937.
(*w*) See *Egerton* v. *Matthews*, 6 East, 307; *Allen* v. *Bennet*, 3 Taunt. 169; *Thornton* v. *Kempster*, 5 Taunt. 786.
(*x*) 3 B. & C. 232; S. C. 5 D. & R. 82. 1 C. & P. 294.
(*y*) 10 B. & C. 671.
(*z*) 4 Taunt. 582.

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Arnold v. *Revoult.* The plea expressly states, that the plaintiff was not aware that *Drake* was a partner, he cannot therefore be supposed to have entered into the contract to become the servant of the two, to the exclusion of the third; the legal effect therefore of his contract is, that he would have been liable to the defendant *Drake*, if he had broken his contract, and therefore, has a remedy against him.

TINDAL, C. J.—I am of opinion, that the demurrer in this case must be overruled. The action is brought upon an express contract, entered into between the defendant *Knight* and one *Surgey* of the one part, and the plaintiff of the other part. It appears by the plea, that both the defendants, *Knight* and *Drake*, together with *Surgey*, were carrying on business as type founders, under the firm of *Knight and Company*, *Drake* being a dormant partner in that firm. The contract entered into is a special agreement in writing, made *inter partes*, in their christian and surnames, and not in the name of any firm. I am not aware of any case in which it has been held, that under such circumstances, a dormant partner is liable to be sued. I take it, that *Siffkin* v. *Walker*, and *Emly* v. *Lye*, are authorities the other way, as far as they go. In the latter case, though the money obtained by the bill was applied to the partnership purposes, yet the bill being drawn by one partner only, in his own name, and not in the name of the firm, it was held that the firm was not liable. It has been said, that *The South Carolina Bank* v. *Case*, takes away the effect of *Emly* v. *Lye*, but I think no such effect is to be given to it, and that the decision in *Emly* v. *Lye*, is sound law. The cases of *Angerstein* v. *Clarke*, and *Arnold* v. *Revoult*, do not interfere with this view of the case; in both those cases it was the law which set up a remedy, and the instruments upon which the party sued, were undoubtedly described according to their legal effect; but it is not the legal effect of the agreement in this case to make the defendant *Drake* liable. It appears to me clear, that upon the face of the agreement, the plaintiff has declared his intention to enter into the contract with the two individuals therein named, and *with them only*; because the agreement is, that he will serve them "*and the survivor of them*" for seven years: I cannot see how that can be construed into a contract to serve another party not named. As to the sum of 500*l.* being in the nature of *specified damages*, and *not* a *penalty*, I do not apprehend that that would make any difference in the case; for one partner can have no more right to bind another, without authority, either express or implied, to pay a sum as liquidated damages, than he would have to bind him to a penalty. Looking therefore at the nature of the contract which is in writing, and made with *Knight* and *Surgey* by name, I am of opinion, that the defendant *Drake* is not liable to be sued upon it, and that his plea must be allowed.

PARKE, J.—I am of the same opinion, and I think the principle of *Siffkin* v. *Walker*, and *Emly* v. *Lye*, governs the present case: it is not necessary therefore to go through the other cases that have been cited.

VAUGHAN, J.—I am of the same opinion. It is impossible to say that a party can be made liable upon an express contract, in which his name is not mentioned, nor that of any firm of which he is a member. Though *Knight*

and *Surgey* are mentioned as partners in the agreement, yet the contract is entered into with them *individually*. In *Stead* v. *Salt* (*a*), where three of five partners signed a submission to arbitration, it was held, that it did not bind the two who had not signed, although the subject matter referred arose out of the business of the firm, it not being within the ordinary course of transactions in trade between partners (*b*).

BOSANQUET, J.—Whatever may be the general liability of a dormant partner, I think the plaintiff in this case, is concluded, by the frame of the contract he has entered into, from seeking to render the defendant *Drake* liable upon it. It is a contract made *inter partes*, in which *Knight* and *Surgey* say, they are co-partners, (no mention being made either of *Drake* or of any firm;) and it is signed by them individually.

Judgment for the defendant.

(*a*) 3 Bing 101; S. C. 10 Mo. 389. 227, acc.; but see *Boyd* v. *Emmerson*, 4 N. & M. 99.
(*b*) See *Strangford* v. *Green*, 2 Mod.

MOULE *v.* BROWNE.

Jan. 25.

On the 28th *March*, the defendant having a check upon a banker at *Bath*, got it cashed at a branch of the *North Wilts* Bank at *Malmesbury*. It was forwarded, and arrived the same day at the chief office of the Bank at *Melksham*, where it was detained till the night of the 30th, when it was forwarded by a private hand to *Bath*, and presented there on the 31st, and dishonoured:—*Held*, that the delay in the presentment on the part of the *North Wilts* Bank, amounted to laches, and that they could not recover against the defendant.

THIS was an action by the public officer of the *North Wilts* Banking Company, upon a check drawn on *Moger* and Co., bankers at *Bath*, and cashed by the *N. Wilts* Bank, for the defendant. The declaration contained the usual averment, that the check had been duly presented and dishonoured. The second plea traversed this averment.

At the trial, before *Patteson*, J., at the last *Wiltshire* Assizes, it appeared that the check had been cashed on the 28th *March*, at *Malmesbury*, where there was a branch office of the *North Wilts* Bank; that on the same day, the check was forwarded to the chief office at *Melksham* (about eighteen miles distant from *Malmesbury*), where it was kept till the 30th, on which night, it was sent by a private hand to *Bath* (about twelve miles distant from *Melksham*), and that it was presented to *Moger* and Co. on the 31st, and was dishonoured. It was also shewn, that it was the course of business of the *North Wilts* Bank, to transmit checks, which had been paid into the Branch Bank, to the principal office. The question was, whether there had been any *laches* on the part of the *North Wilts* Bank; *Patteson*, J., was of opinion that there had been, and consequently directed the jury to find for the defendant upon that issue. They found, however, a verdict for the plaintiff.

Bompas, Serjt. had obtained a rule *nisi* to set aside that verdict, and enter it for the defendant, pursuant to leave reserved.

Barstow now shewed cause.—There is not any inflexible rule, that a party receiving a check is bound to put it in motion the next day; all that is necessary is, that he should use reasonable diligence; *Rickford* v. *Ridge* (*a*), and

(*a*) 2 Camp. 537.

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it was competent to the jury to say whether such diligence had been used in this case.—[*Tindal*, C. J.—It has been held in several cases, that reasonable diligence is a question of law arising out of the facts.—*Park*, J.—In *Boddington* v. *Schlencker* (*b*) that principle was acted upon, and the Court of *King's Bench* there held, that if the holder of a check pay to his bankers before the time at which the bankers, by presenting it at the clearing house might obtain payment on the same day, the drawer is not discharged by their omitting so to present it; although, according to the custom of *London*, it may be imperative upon the bankers, as between them and their customers, so to present it.—*Vaughan*, J.—In *Tindal* v. *Brown* (*c*), the rule was established, that reasonable notice is a question of law.]—Then there is the question, whether, according to the rule of law, this check was not presented in reasonable time. It was shewn that the practice of the bank was, that checks which were paid into the branch establishment were transmitted to the principal office, and the defendant must be presumed to have dealt with the bank upon the footing of that practice. Now the check was paid into the branch bank on the 28th; they were not bound to send it to *Melksham* till the next day, the 29th, by the post; it would then have arrived there on the 30th; and it would have been sufficient if it had been forwarded by the chief bank by that night's post, in which case, it would have arrived at *Bath* on the morning of the 31st, on which day it was in fact presented. If this course had been pursued, it is clear that there would have been no *laches* on the part of the plaintiff; and it is not because unnecessary speed has been used by the bank in sending the check to their principal office, that they are to be considered guilty of *laches* in not having sooner forwarded it to *Bath*. It was certainly competent to the jury to take all the facts and dates into their consideration, and say whether or not, due diligence had been used on the part of the bank.

Bompas, Serjt., *contrà*, was stopped by the Court.

TINDAL, C. J.—This rule must be made absolute. There is no doubt, that when a party is bound to give notice of dishonour, and he has not done so within the ordinary time, it is competent to him to shew the existence of any particular facts which would take the case out of the general rule; such for instance, as that he could not find the person to whom the notice was to be given; but it is incumbent on the party who seeks to escape from the rule, clearly to establish the existence of such facts. I do not see any thing in this case to take it out of the general rule that has been established by a variety of decisions, viz., that a holder of a check ought to present it on the following day from that on which he receives it. That rule was established in *Robson* v. *Bennett* (*d*), and has been recently confirmed in *Boddington* v. *Schlencker*; on the authority, therefore, of these cases, I am of opinion that there has been *laches* in this instance on the part of the *N. Wilts* Bank.

The other judges concurred.

Rule absolute.

(*b*) 1 N. & M. 540; 4 B. & Ad. 752.
(*c*) 1 T. R. 167.
(*d*) 2 Taunt. 388.

CLARE and others *v.* COOK.

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Jan. 25.

The plaintiffs sold the defendant eight chests of tea, one of which turned out to be damaged; the plaintiffs made an allowance in respect of such damage, and afterwards arrested the defendant for 41*l.*, being the balance of the account, after deducting the allowance. At the trial, the plaintiffs recovered 30*l.* 15*s.* only, it being agreed they should have back the damaged chest, which was afterwards sold by them for 10*l.*, being only a trifle less than the amount claimed:—*Held*, that under these circumstances the defendant was not entitled to his costs under 43 *G.* 3, c. 46.

THE plaintiff had arrested the defendant for 41*l.*, as the balance of the price of eight chests of tea; the only plea was the general issue, and no money had been paid into Court. The defence was, that one of the chests of tea had been damaged by sea water, and was unfit for use. At the trial before *Park*, J., the plaintiff recovered a verdict for 30*l.* 15*s.*; the sum of 10*l.* 5*s.* (the amount charged for the chest in dispute) having been deducted upon an arrangement that the plaintiff was to have back that chest.

Kelly had obtained a rule *nisi*, that the defendant might have his costs under the 43 *G.* 3, c. 46, as having been arrested for the larger amount without reasonable or probable cause; he produced affidavits that the chest in question was wholly unfit for any purpose, and that the plaintiff had himself acknowledged the tea was altogether unsaleable, and that it was "complete rubbish;" that the defendant refused to keep the tea, but at the plaintiffs' request had allowed it to remain on his premises, that the defendant had paid the plaintiffs money on account, upon the express understanding, that such payment was on account of the approved chests, without reference to the damaged one. That the defendant had repeatedly offered to pay the amount of the good chests, and had required the plaintiffs to remove the bad one.

Wilde, Serjt. and *Jardine* shewed cause upon affidavits, denying the greater part of the statements made in the defendant's affidavits, and stating that the tea was only partially damaged, and that in respect of such damage they had offered to make the defendant an allowance of 2*l.* 5*s.*, which the defendant agreed to accept, and that the chest of tea in question, had been *bonâ fide* sold by the plaintiffs after the trial, for 10*l.*, being together with the 30*l.* 15*s.* recovered by the verdict, only 5*s.* less than the sum for which the defendant had been held to bail.

Kelly and *Dowling* were heard in support of the rule.

TINDAL, C. J.—The only question is, whether, looking at the affidavits of this case, it is made out to our satisfaction that the plaintiff arrested the defendant in the larger sum, without reasonable or probable cause; the affidavits are very contradictory, but there are some strong facts stated in favour of the plaintiffs, which I think are not easily to be got over. It does not appear that the plaintiffs ever abandoned their claim for the full amount, for which they arrested the defendant, having previously as they swear, agreed to allow him the sum of 2*l.* 5*s.* in respect of the damaged portion of the tea; then it appears that the verdict was recovered by the plaintiffs for the smaller sum, in consideration of their taking back the disputed chest, and that the contents of that chest in fact afterwards realized a sum which was only 5*s.* short of that claimed by the plaintiffs at the time they arrested the defendant. I cannot therefore say, that with these circumstances before

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me, it is made out to my satisfaction, that the arrest for the larger amount was made without probable cause; and I think therefore that the defendant's rule must be discharged.

PARK, J.—I must say, I very much regret that this Statute was ever passed, as I believe it has led to an incalculable deal of perjury. It is an anomaly in the English law to try actions upon affidavits. However, we are bound hand and foot by the provisions of the Act, and however difficult I may find it, to reconcile some of the statements in the affidavits with the evidence produced before me at the trial, I am bound to decide now according to the affidavits; and upon them, I think the rule must be discharged.

VAUGHAN, J.—The question is, did the plaintiffs, in arresting the defendant for the larger sum, act under the *bonâ fide* persuasion, that they were right in so doing? It appears to me that they did. The allowance of 2*l.* 5*s.*, made by the plaintiffs, with respect to the damaged tea, is evidence that they were anxious not to arrest the defendant for more than they really conceived to be due from him. It appears to me that this is a desperate attempt on the part of the defendant to obtain the relief of the Court which he is not entitled to. If he had acted *bonâ fide*, why did he not pay at any rate the undisputed balance into Court? We can only administer the law upon the facts before us, and I think we are bound to discharge the defendant's rule.

BOSANQUET, J.—I of course know nothing of the facts in this case, but from what appears from the affidavits. The defendant's case is, that one of the chests sold to him by the plaintiffs was utterly worthless, and therefore, that the plaintiffs had no reasonable cause to arrest him for the amount of that chest; the plaintiffs on the other hand say, that the chest was sound, or at least it was not worthless, and they shew, by an affidavit of an independent party, that the chest in fact sold for only 5*s.* less than the sum claimed by them. It seems to me impossible to say upon these affidavits, that the plaintiffs had no reasonable or probable cause for arresting the defendant for the amount they did.

Rule discharged.

(*a*) See *Linley* v. *Bates*, 2 Cromp. & Jer. 659.

Jan. 25.

GATLIFFE *v.* BOURNE and others.

By the 56 *G.* 3, c. 5, (the *Irish* Stamp Act), bills of lading require to be stamped; and by the third section, no unstamped writing, which ought to have been stamped, shall be received in evidence in any Court in *Ireland*, or admitted in any Court in *Ireland* to be good or available in law or in equity.

Quære, whether a bill of lading made in *Ireland*, having no stamp, can be received in evidence here.

THIS was an action by a shipper of goods against carriers, the owners of a steam vessel, for not delivering the goods (*a*). At the trial before

(*a*) See the Pleadings, *post.*

Tindal, C. J., at the *London* Sittings after *Trinity Term*, 1837, the plaintiff offered certain bills of lading in evidence, which had been made in *Ireland*, but bore no stamp: the defendants insisted, that by the Irish Stamp Act 56 *G.* 3, c. 5, they were not admissible in evidence (*b*), and the Lord Chief Justice being of the same opinion, the plaintiff was nonsuited; leave however was reserved to him to move to set aside the nonsuit, and have a new trial.

Wilde, Serjt., had accordingly in last *Michaelmas Term* obtained a rule *nisi*, pursuant to such leave; and also upon an affidavit, that since the trial the bills had been stamped, both with an *English* and an *Irish* stamp.

Wightman, now shewed cause.—By the *Irish* Stamp Act, the bills of lading in question, being unstamped, could not be admitted "in any Court in *Ireland*, to be *good* or *available* in law or equity;" and the question is, whether an action is maintainable in one country upon an instrument, which is not available in another country in which it was originally framed. It would be clearly against the policy of the stamp laws to decide this question in the affirmative, as if it were so decided, a party in *Ireland* having an instrument in his possession, which was unavailable there, would only have to cross the water and bring his action here; and the same plan might be pursued with respect to *English* documents, which were invalid by reason of their not being stamped. —[*Tindal*, C. J.—The plaintiff in either case might find some difficulty in getting over his witnesses.]—The rule of law is, that where a document is unavailable in one country, it is to the parties as if it had never existed, and cannot be enforced in any other country.—[*Bosanquet*, J.—The Statute does not say that an unstamped instrument should be *void*.]—It says, it shall "not be good or available," which is to the same purport. In *Alves* v. *Hodgson* (*c*), an action was brought upon an unstamped promissory note, made in *Jamaica*, and it was proved that by the laws of that country, a certain stamp was imposed on all such instruments; and Lord *Kenyon* ruled at *Nisi Prius*, that the note could not be received in evidence in this country; and afterwards upon a motion for a new trial, his lordship stated, "It is said that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made, and unless it be good there, it is not obligatory in a Court of law here" (*d*). In *Clegg* v.

(*b*) By sec. 30, All matters which should be on stamped paper, written on *unstamped* or improperly stamped paper, shall be of *no other* effect than if they had been written on *unstamped* paper; and all persons using improper stamps, shall incur the same penalty as if they had used unstamped paper.

By sec. 32, Every person who shall neglect to use the proper stamp, or use none, shall be accountable to His Majesty for the amount of the duty, as a debt, and the Barons of the Exchequer in *Ireland*, upon application of the Commissioners of Stamps, may enforce the payment with costs.

By sec. 33, All judges in *Ireland* are to take judicial notice of the stamp duties, and no unstamped writing, which ought to have been stamped, shall be pleaded, or given, or received in evidence *in any Court in Ireland*, or admitted in *any Court in Ireland* to be good or available in law or equity.

By sec 47, Writings upon unstamped or improperly stamped paper, may have the proper stamp affixed, on payment of a certain penalty.

(*c*) 2 Esp. 527; 7 T. R. 241.

(*d*) It does not appear from either of the reports of this case, what the exact terms of the law were, by which the stamp was imposed; whether they were similar to those of the Irish Stamp Act, or expressly declared that an instrument without a stamp should be absolutely *void*.

Levy (*e*), which was an action upon an agreement entered into in *Surinam*, Lord *Ellenborough* said, "a contract must be available by the law of the place where it is entered into, or it is void all the world over." That rule is strictly applicable to this case, the bill in question is not "available" in *Ireland*, and therefore, it is "void" here.—[*Park*, J.—That sentence must be taken in connection with what Lord *Ellenborough* previously said, *viz.*, "I should clearly hold, that if a stamp was necessary to render this agreement *valid* in *Surinam*, it cannot be received in evidence without that stamp here."]—The words *valid* and *available*, mean the same thing; and the latter word is used in the *Irish* Stamp Act. The bill therefore was not receivable in evidence in this cause, and the plaintiff can only have his new trial upon his affidavit on payment of costs.—[*Park*, J.—It may be important to observe, that this Statute is not passed by the *Irish* Parliament, but by the Imperial Legislature.]

It was afterwards arranged between the parties, that the rule should be made absolute, and the costs should abide the event.

Rule absolute accordingly.

[Although the Court gave no decision in this case, and the point in fact was not fully argued, it has been thought desirable to give this brief report of what took place, as the question under discussion was one of considerable importance. The reporter has been informed, that previously to the objection being started in this case, it had not been customary to stamp bills of lading, upon goods shipped from *Ireland* to *England*: but that since this case arose, it has been thought the safer course to do so.]

Lord *Kenyon* is reported to have said at *Nisi Prius*, (2 Esp. 530,) "In deciding on an instrument made abroad, I think we are bound to consider the laws of that country where the contract is made, and if they are not obligatory by such laws, they cannot be enforced here. *By the law of Jamaica given in evidence, the instrument produced would be* invalid *for want of a stamp.*" In *Holman* v. *Johnson* (1 Cowp. 343), Lord *Mansfield* said, "There can be no doubt, but that every action tried here must be tried by the law of *England*; but the law of *England* says, that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern. There are a great many cases which every country says shall be determined by the laws of foreign countries, where they arise. But * * * no country ever takes notice of the *revenue* laws of another." So in *James* v. *Catherwood*, 3 D. & R. 190, *Abbott*, C. J., said, "It has been settled, or at least considered as settled, ever since the time of Lord *Hardwicke*, that in a *British* Court we cannot take notice of the *revenue* laws of a *foreign* state. It would be productive of prodigious inconvenience if in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid." It might be a question, however, how far this rule would apply to *Ireland*.

(*e*) 3 Camp. 166.

YATES *v.* WHITE and others.

Common Pleas.

Jan. 26.

In an action for running down a vessel, the defendant cannot avail himself of a payment made to the plaintiff by underwriters who had insured the vessel.

THIS was an action on the case, tried before the Lord Chief Justice on the 14th of *April*, 1836, to recover damages sustained by the plaintiff, by reason of the defendant's vessel, the *Gazelle*, having run foul of the plaintiff's vessel, the *Sesostris*, by the carelessness and mismanagement of the defendants.

The jury found a verdict for the plaintiff for the amount of the repairs; the amount of damages being referred to an arbitrator. The arbitrator awarded that the amount of damages, upon the verdict already entered up for the plaintiff, should be reduced to the sum of 1*s*. And he stated, that in so ascertaining the damages, he had made an allowance to the defendants of 172*l*. 4*s*. 11*d*., from the expences incurred by the plaintiff, in effecting the repairs of the *Sesostris*, by reason of the last mentioned sum having been paid to the plaintiff for the said repairs, by the underwriters, under a policy of insurance effected by the plaintiff, upon the *Sesostris*. And that the said sum of 172*l*. 4*s*. 11*d*. was paid by the said underwriters to the plaintiff, after the commencement of the action, and before the plea of the defendants was pleaded, and in case the Court should be of opinion that the said sum had been improperly allowed to the defendants, then the arbitrator fixed and ascertained the damages sustained by the plaintiff, at the said sum of 172*l*. 4*s*. 11*d*. The only loss which occurred on the voyage was that occasioned by the collision aforesaid.

The action was commenced and carried on by the instructions of the plaintiff for his own use and benefit, and not by the instructions of the underwriters.

A rule was obtained by the plaintiff in this cause, to have the damages increased by the said sum of 172*l*. 4*s*. 11*d*., but the Court directed that the facts should be stated for their judgment in the form of a special case.

The question for the opinion of the Court was, whether under the circumstances before stated, the allowance made by the arbitrator to the defendants, by reason of the payment made to the plaintiff by the underwriters, was a proper allowance.

Wilde, Serjt., (with whom was *S. Martin*) for the plaintiff.—The real question in this case is, whether, in an action by an assured against a wrong-doer, the latter can avail himself of the damages paid to the former by the Insurance Office. The arbitrator was wrong in making the allowance he did. There is no privity here between the defendants, who are the wrong-doers and the underwriters; nor is it a case of two wrong-doers, where one has paid the damages, and then the plaintiff sues the other; in which case, the latter undoubtedly would have an answer to the action, by shewing the payment made by the former wrong-doer. The underwriters pay the money to the plaintiff by virtue of a contract entered into between them, and of which the defendants have no right to have the benefit; for as to them it is *res inter alios acta*. The wrong-doer had no right to call upon the underwriters to pay the assured; they had no means of enforcing such payment; but if

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the assured recovers, first against the underwriters, and afterwards against the wrong-doer, he becomes a trustee for the underwriters in respect of the amount he so recovers against the wrong-doer; it is true, that the case states that the action is brought by the plaintiff, as assured, for his own benefit, but that will not affect the rights of the parties, or debar the underwriters from their claim over against the plaintiff. The rule is thus laid down in *Park on Insurance* (*a*). "Although the insured may recover from the insurer, the expences of salvage; yet he shall only be entitled to an indemnity, and shall not receive a double satisfaction for the same loss. Then, *if the insurer should have paid to the insured, the expences* arising from salvage; *and afterwards*, on account of some particular circumstances, *the loss should be repaired* by some unexpected means, *the insurer shall stand in the place of the insured*, and receive the sum thus paid to atone for the loss." This rule was established in *Randall* v. *Cockram* (*b*). An insurance is merely a contract of indemnity between the parties; *Godsall* v. *Boldero* (*c*); but a wrong-doer cannot avail himself of it. The underwriter, upon payment of the loss, stands in the situation of the owner, *Case* v. *Davidson* (*d*); the former would be entitled to recover from the latter, both at law and in equity, any sum which he may have recovered from a third party by way of compensation for an injury, for which the underwriter had paid; but the wrong-doer has neither legal privity or equities in such a case; it cannot surely be contended, that the assured becomes a trustee for *him* in receiving the amount of his insurance from the underwriters. In *Irving* v. *Richardson* (*e*), it was held, that a party insured by one policy for 1700*l.*, on a ship valued at 3000*l.*, and by another for 2000*l.* on the same ship, valued again at 3000*l.* was not entitled to receive more than 3000*l.* on the two policies: but the defendants in this case have no right to object that the plaintiff by recovering against them, would receive more than a compensation; for there is no analogy between the case of an underwriter and a wrong-doer; and the defendant at any rate, would not pay more than the proper compensation. There are cases however even of contract, in which a party may recover more than a strict compensation, *Bell* v. *Puller* (*f*), *Street* v. *Blay* (*g*). The principle was much discussed in *Cullen* v. *Butler* (*h*), where Lord *Ellenborough* said, "it is no objection to the plaintiff's right to recover against the underwriters in this case, that he may have also a right to recover against the persons by whose immediate act the damage was occasioned;" *à fortiori*, therefore it is no objection to the right of the assured to recover against the wrong-doer, that he has received the money from the underwriters. The establishment of an opposite principle would introduce the greatest confusion. Suppose the case in which a plaintiff has recovered damages against the sheriff for an escape, and afterwards sues the original defendant for the debt, the latter could not plead in bar, or give in evidence, in reduction of damages, the judgment obtained against the sheriff; that doctrine was expressly laid down

(*a*) Vol. 1, p. 226.
(*b*) 1 Ves. sen. 98.
(*c*) 9 East, 72.
(*d*) 5 M. & S. 79; S. C. (affirmed in error) 5 Moo. 116; 2 B. & B. 379; 8 Price, 542.
(*e*) 2 B. & Ad. 193; S. C 1 M. & Rob. 153.
(*f*) 2 Taunt. 285; S. C. 12 East. 496, n.
(*g*) 2 B. & Ad. 456.
(*h*) 5 M. & S. 461; S C. 4 Camp. 289.

by *Abbott*, C. J., in *Hunter* v. *King* (*i*); that was an action against an attorney for negligence in preparing an annuity, and the alleged grantor of such annuity was held an admissible witness to prove it a forgery, notwithstanding an objection was made to him as being interested; for if the plaintiff brought an action against him (the witness) upon the annuity, he could not avail himself of the verdict in that action, because it was *res inter alios acta*. The other side may possibly rely upon *Bird* v. *Randal* (*j*), where a party having seduced a servant from his master, and the servant having paid the penalties stipulated by his articles for leaving him, it was held that the master could not maintain an action against the seducer, upon the principle that he could not twice recover compensation for the same wrongful act.—[*Bosanquet*, J.—In that case, the satisfaction was received after the second action was commenced.]—That is also the case here. But after what fell from Lord *Ellenborough*, C. J., in *Godsall* v. *Boldero*, the case of *Bird* v. *Randal* must be considered of very doubtful authority; besides, it is distinguishable from the present; for there both the parties sued were concerned in the wrongful act, by which the plaintiff was damaged; in this case, the injury of which the plaintiff complains, resulted solely from the wrongful act of the defendants.—[*Bosanquet*, J.—The case of *Mason* v. *Sainsbury* (*k*) appears to be in point, where it was held that an Insurance Company, who had paid a loss occasioned by a riot, might sue the Hundred upon the Riot Act, in the name of the insured.]

Sir *W. Follett* (with whom were *Kelly* and *Richards*) in support of the rule.—By no analogy is the plaintiff entitled to recover from the defendants, the amount which he has already received from the underwriters. It is not a question whether the plaintiff has a right to maintain an action, which it is conceded he has; the question is merely as to the amount of the damages. It is an action against the owners of a vessel, for damage done through the misconduct of their servants; the measure of the damages to be recovered is the amount of the actual injury sustained; now the amount of that injury was originally 172*l.* 4*s.* 11*d.*, but that sum the plaintiff has received from the underwriters after the commencement of the present action; the plaintiff therefore has been compensated for the injury he had sustained, and is not entitled to more than nominal damages from the defendants.

But it is said, that this is an action against a wrong-doer: but that makes no essential difference; every one who breaks a contract or commits a trespass, may in law be termed a wrong-doer. The true principle is, that the plaintiff cannot recover twice for the same cause of action. If the underwriters sustain any legal damage, they will undoubtedly be entitled to a legal remedy; but the plaintiff, although he has his election to sue either the underwriters, or those by whom he has suffered an injury, cannot recover against both of them; and in this case he has made his election. It is said, that this is not like the case of two joint tort-feasors; but the distinction has not been pointed out; the principle that applies to such a case, applies equally to this. A party injured may sue both together, or either; but he can-

(*i*) 4 B. & A. 209.
(*j*) 3 Burr. 1345; S. C. 1 W. Bl. 387.
(*k*) 1 Marsh. on Insurance, 796; 3 Doug. 69.

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not recover first against the one and then against the other. In an action against an attorney for negligence, if the injury had been compensated to the client by any third person, the client could only recover nominal damages against the attorney; so in an action against the sheriff for an escape, if the debt were paid, that would surely go in mitigation of damages. So in an action against a guarantor, if the money were paid by the principal, that also would go in reduction of damages; so in cases of bills of exchange, the acceptor is primarily liable, but the holder may sue all prior parties to it at the same time; but if he recover against one, he can only recover nominal damages against the others. The case of *Mason* v. *Sainsbury*, has been referred to; that was an action against the hundred, brought by the insurers, in the name of the insured, and it was held that the action would lie; but it is expressly found in the present case, that this is brought by the plaintiff *for his own benefit*, which makes a marked distinction between the two cases; and it is worthy of observation, that in a second action arising out of the same circumstances, the *London Assurance Company* v. *Sainsbury* (*l*), which was brought by the Insurance Office against the hundred, upon the ground that sufficient compensation had not been recovered in the former action, it was held that the action was not maintainable. It appears also from Lord *Tenterden's* judgment in *Clarke* v. *The Inhabitants of Blything* (*m*), that the object of the decision in *Mason* v. *Sainsbury*, was to carry into effect the intention of the legislature, in passing the Riot Act, viz., to render the inhabitants of hundreds vigilant for their own sake, as well as that of the public; besides, that case is wholly distinguishable from the present; the plaintiff here, is seeking to recover compensation for an injury, for which in point of fact, he has already been compensated.—[*Tindal*, C. J.—Suppose a person out of mere charity, had compensated the plaintiff, would that constitute a defence in an action against the wrong-doer?]—Possibly it might not, although in *Godsall* v. *Boldero*, something in the nature of a payment in the way of charity, was allowed to be a defence to an action brought by an insured against an insurer. In that case, a creditor of Mr. *Pitt's* had insured his life in a certain amount; Mr. *Pitt* died in insolvent circumstances; a sum of money having been granted by parliament to pay his debts, his executors had paid the creditor in question the amount of his demand, and it was held he could not recover on his policy from the Insurance Office.—[*Bosanquet*, J.—The present case states that the plaintiff is suing for his own benefit: we may suppose therefore, that if he recover damages against the defendants, he will keep the money if he can; but as he would be only a trustee for the underwriters, they would probably lose no time in filing a bill against him.]—The Court here must decide upon the legal rights of the parties, and cannot take cognizance of any equities which may subsist between them. In *Bell* v. *Puller*, a ship was let to freight for the voyage, to take out a cargo to *St. Petersburgh*, and to bring home a return cargo, for which freight was to be paid at so much a ton, for the whole ship's admeasurement. If from political circumstances she should be unable to discharge her cargo, and consequently to obtain a return cargo, the freighters agreed to pay a gross sum, less than the amount of the freight per ton. The ship was prevented from discharging,

(*l*) 3 Doug. 245.

(*m*) 2 B. & C. 254; S. C. 3 D. & R. 489.

and the freighter supplying no homeward cargo, the master took in other goods on freight, and brought them home, together with the original cargo, and the Court held, that he was entitled to receive the gross sum stipulated, and also to retain the freight which the ship had earned; for there was no reason, according to the judgment of *Mansfield*, C. J., why the person who had stipulated to pay such gross sum, should be discharged from any part thereof, on account of the profit which the master might make by a cargo supplied by any third person; but in *Staniforth* v. *Lyall* (*n*), the case was this:—the plaintiff chartered a ship to the defendants: the charter-party contained a stipulation, that the ship should proceed to *New Zealand*, and that when arrived, the master should give notice of the fact to the defendant's agent there, and wait fourteen days for a return cargo; but that if the agent of the defendants should give notice of his determination not to load the ship with a return cargo at *New Zealand*, the voyage should be at an end, and the defendants should pay a dead freight of 500*l*. The ship accordingly proceeded to *New Zealand*, and the master, after waiting the necessary time, and *finding no agent* of the *defendants there*, went round to *Batavia*, and there obtained for the ship a much more valuable freight than she would have earned under the charter-party, after taking into consideration the increased expences, and the delay of the circuitous voyage. The cause was referred, and the arbitrator taking into account the larger freight earned by the ship on the homeward voyage, directed the verdict to be entered for *one shilling* damages, for the general breach of contract, and the Court refused to set aside the award. In that case there was no privity of contract between the defendant and the persons who had furnished the homeward cargo. The doctrine laid down by Lord *Ellenborough* in *Cullen* v. *Butler*, does not apply, for as has been before stated, it is not disputed that the plaintiff has a right of action in this case, the only question being as to the amount of damages he can recover. If the plaintiff had been paid by the present defendants, it is clear from the case of *Godsall* v. *Boldero*, that he could not have maintained an action against the underwriters. In *Bird* v. *Randall*, the action against the servant was for a *penalty*; if it had been for *damages*, Lord *Ellenborough's* observations in *Godsall* v. *Boldero*, would not have applied; for his Lordship reasons thus, "It was assumed that the sum taken as the penalty from the servant, was the extreme limit of the injury sustained by the master: but there is the doubt; for the penalty might have been so limited, because of the inability of the servant to undertake to pay more; and yet it might have been very far from an adequate compensation to the master, for the injury done him by another who seduced his servant from him." It is clear therefore, that if the action against the servant had been for *damages* for a breach of the covenant, in which the master would have recovered a full compensation for the injury he had sustained, Lord *Ellenborough's* observations would not have been applied, and the principle which is contended for in this case, would have been applicable, *viz.*, that the party injured, could not recover a second compensation for the injury.—[*Vaughan*, J.—Your argument goes to shew, that if the underwriters have been sued and have paid, the wrong-doer would go scot-free, and have all the benefit of the premium and insurance, without being at the expence of insuring.]—On the other hand,

(*n*) 4 Moo. & P. 829; S. C. 7 Bing. 169.

it must be contended, that a party insuring may recover a compensation twice, and if twice why not for any indefinite number of times?—[*Park, J.* —Suppose a poor man is knocked down and beaten, and laid up for six weeks, and is obliged to call in a surgeon, and then some one out of charity pays the surgeon's bill for him. If he afterwards bring an action against the wrong-doer, would that payment reduce the damages.]—The plaintiff in such a case could not recover the amount of the bill, for he has neither paid it, nor is he liable to pay it. In such a case, however, the plaintiff would be entitled to recover *nominal* damages, even if he could not prove any *actual* damage, as in *Marzetti* v. *Williams* (*o*), where it was held, that a banker was liable to an action of tort, for refusing to pay the check of a customer, having sufficient funds of his in hand, although the customer had not sustained any actual damage. If the plaintiff has received compensation from the underwriters, they could not compel him to sue the wrong-doer.—[*Tindal,* C. J.—That seems almost provided for by the terms of the policy, *viz.*, that the underwriter may sue in the name of the insured, undertaking to pay all the costs.]—That brings the question back to what are the legal rights of the parties; this action is not brought as trustee, but it is brought by the plaintiff for his own benefit, to enforce his own legal rights; and the cases cited establish, that where a person has a legal right against one or more parties, he cannot recover in respect of such right against both separately.

Wilde, Serjt.—Although the present action is brought by the plaintiff for his own benefit, that cannot impeach the rights of the underwriters, be they legal or equitable; the present action must enure for the benefit of those who are in law, entitled to such benefit. The argument on the other side would go this length; that if the underwriters paid upon the loss of a ship, and an anchor belonging to the ship were afterwards found by a third party, against whom the owners brought *trover,* the defendant could set up the payment by the underwriters, and insist that he was only liable to nominal damages. The principle that no man can recover a compensation twice, is not disputed, as far as regards the *same right;* but this action is not brought in the same right upon which the former was maintained against the underwriters; the one is founded upon a *tort,* the other upon a contract. [He was stopped by the Court].

TINDAL, C. J.—The present case appears to me to be decided by the principle of *Mason* v. *Sainsbury* (*p*), where it was held, that an action was maintainable against the Hundred under the Riot Act, by an insurer in the name of the insured, to recover damages which had been paid by the former to the latter. The only distinction between that case and the present is, that here the action is brought by the assured for his own benefit; but in reality that makes no difference. Lord *Mansfield,* in giving judgment in that case, said, "Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured. The case is clear: the Act puts the Hundred, for civil purposes, in the place of the trespassers; and upon principles of policy, as in the case of other remedies against the Hundred, I am satisfied that it is to be considered as if the insurers

(*o*) 1 B. & Ad. 415. (*p*) 3 Dougl. 61.

had not paid a farthing (*p*)." The principle that the insured stands as trustee for the insurer, after the latter has paid, is established by the case of *Randal* v. *Cockram*: whatever money therefore the plaintiff may recover in the present action, equity will undoubtedly compel him to pay over to the underwriters. The case of co-trespassers is clearly distinguishable from the present; there, the plaintiff having received only one injury, has a right of action against all the wrong-doers jointly; but if he proceed against one only, which he may do, and recover against him, the damages he receives are considered as paid on behalf of the other co-trespassers, being made in respect of one and the same injury. It is true that an injured party cannot have a double satisfaction for the same injury; but he will not have it in this case, as the underwriter may insist upon his rights, and recover the damages from the plaintiff. If we were to decide, in this instance, in favour of the defendant, we should, as has been said, in fact decide that a wrong-doer might have all the advantage of an insurance without paying any of the expence of it. The plaintiff, therefore, must have judgment, and the award must be amended by inserting the sum of 172*l.* 4*s.* 11*d.* as the amount of the damages.

PARK, J.—I am of the same opinion. It is laid down by the different text-writers, that the insurer, upon paying the amount of the insurance, stands in the situation of the owner; and that the latter becomes trustee for the former as to any damages he may recover from the wrong-doer, by whose act the damage was occasioned; and this position is fully borne out by the various cases which have been cited at the bar. In *Mason* v. *Sainsbury*, the judges were unanimous in the decision they came to; and although they differed in opinion in the subsequent case of *The London Assurance Company* v. *Sainsbury*, as to whether the action could be brought in the name of the insurer, they all agreed as to the general doctrine, that the owner was to be considered as trustee for the insurer; and *Ashurst*, J., expressly says, "Can the owner, after being paid by the insured, recover against the trespasser? Certainly he can." That case, therefore, instead of militating against *Mason* v. *Sainsbury*, is in support of it. It is also recognised and acted upon in *Clark* v. *The Inhabitants of the Hundred of Blything*; and it appears to me therefore, that those cases govern the present.

VAUGHAN, J.—It has been insisted, on behalf of the defendant, that the point in this case has never been decided; but that is not so, the cases which have been just referred to are directly in point. As to the argument that has been urged, that the plaintiff has no right to recover a double compensation for the same injury, it is sufficient to answer that he would not do so in this instance, for it is clear that the underwriters would have a remedy over against him for the damages he might recover from the defendant. The latter, being a wrong-doer, can clearly have no right to rely upon a payment made by another party, with whom he has no manner of privity.

BOSANQUET, J.—I am also of opinion that this case is in effect decided by that of *Mason* v. *Sainsbury*, which was recognized in the subsequent cases of *The London Assurance Company* v. *Sainsbury*, and *Clarke* v. *The Inhabit-*

(*p*) 3 Doug. 64.

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ants of the Hundred of Blything. The observations of Lord *Tenterden*, in that latter case, as to the operation of the Riot Act, did not in the least degree impeach the former decisions. What was said by *Buller*, J., in *Mason* v. *Sainsbury*, appears to be strictly applicable to the present case: "Whether this case be considered on strict legal principles, or upon the more liberal principles of insurance law, the plaintiff is entitled to recover. Strictly, no notice can be taken of any thing out of the record. Taken in its narrow form, the contract is only a wager; more liberally construed, it is an indemnity. Still, upon the words, and as to third persons, it is only a wager, of which third persons shall not avail themselves. It has been admitted, and rightly, that the hundred is put in the place of the trespassers. How could they have availed themselves of this defence? By plea of accord and satisfaction? It was not paid as satisfaction, and the evidence would not have supported such a plea." It is said, that in this case the plaintiff expressly sues for his own advantage, and it may be admitted that he will retain the money if he can do so; but it appears to me, that will make no difference, as he can be compelled to pay it over to the insurer. I agree with what has been urged by Sir *W. Follett*, that we must decide according to the legal rights of the parties; but I think the plaintiff has the legal right to recover in this instance.

Judgment for the plaintiff (*r*).

(*r*) In *Clark* v. *The Hundred of Blything*, as reported in 3 D. & R., *Bayley*, J., says, "It has been held, in the case of damage done to a ship, that the owner may recover from the underwriters for his own benefit first, and may afterwards sue the author of the damage in his own name, for the benefit of the underwriters." p. 492.

Jan. 27.

COLLEY *v.* SMITH and three others.

Where several co-proprietors of a joint stock company are sued, and some of them, who had the deed of partnership in their possession, suffered judgment by default:—*Held*, that they might be called merely to produce the deed on behalf of those who defended the action.

MURPHY moved on behalf of one of the four defendants (the three others having suffered judgment by default), for a rule, calling upon them to produce the partnership deed. The defendants were co-proprietors of a joint-stock company, and the one, on whose behalf the motion was made, stated, that the production of the deed was necessary for his defence.—[*Tindal*, C. J.—Why cannot he serve the others with a *subpœnâ duces tecum?*]—Being co-defendants, it was apprehended they could not be made witnesses.

TINDAL, C. J.—This application cannot be acceded to. No collusion is shewn between the plaintiff and the defendants, who have suffered judgment by default; merely calling them to produce a document will not make them witnesses.

Rule refused.

BARRY *v.* RAINSFORD.

Common Pleas.

Jan. 27 (*a*).

On judgment by default in an action of *covenant* to recover the instalments due under a deed of separation, the Court granted a rule to compute.

THIS was action of covenant, founded upon a deed of separation between the defendant and his wife, whereby the former covenanted to pay the plaintiff, as trustee for his wife, the sum of 5*l.* monthly, for her support. The action was brought to recover eleven instalments; and the defendant had allowed judgment to go by default.

Pyke thereupon obtained a rule *nisi*, to refer to the master to compute the sum due upon the deed; which, on the last day of term, upon affidavit of service, and no cause being shewn, was made absolute.

(*a*) Mr. Justice *Coltman* sat this day and *Monday*, the 29th *January*, *vice* Mr. J. *Park*.

BUTLER, surviving Assignee, &c., *v.* HOBSON.

Jan. 27 & 29.

In *trover* by the assignee of a bankrupt, a plea that the plaintiff is not assignee, puts in issue the validity of the bankruptcy.

The estate of *A.* (a bankrupt), under a second commission, did not pay 15*s.* in the 1*l.* *A.* subsequently continued to trade, and was in possession of stock to a considerable amount; the assignees under the second commission never interfering, or in any way claiming such stock; *A.* afterwards rendered to

THIS was an action of *trover*, by the surviving assignee of *J. Bakewell*, a bankrupt. The pleas upon which the questions in this case arose were;

The *Second*, that the plaintiff was not assignee of the estate and effects of *J. B.*, a bankrupt; on which issue was joined;

The *Third*, that the plaintiff was not possessed, as of his own property, as such assignee, &c., on which issue was joined;

And the *Fifth*, that long before the bankruptcy of *J. B.*, thereinafter mentioned, the plaintiff and one *T. O.*, were assignees of *J. B.*'s estate and effects, under a commission, dated 19th *April*, 1828; that the plaintiff survived *T. O.* The plea then set out the proceedings under that commission at great length, and alleged that *J. B.* duly obtained his certificate before the Statute 1 & 2 *W.* 4, c. 56, (the Court of Bankruptcy Act) came into operation; that afterwards *J. B.* was a trader and indebted; that he committed an act of bankruptcy, and a *fiat* issued on the 8th *November*, 1836; and (after setting forth the intermediate proceedings), that defendant was duly chosen creditors' assignee; that *J. B.* at the time of such last mentioned bankruptcy, had by the consent and permission of the plaintiff, then being as such surviving assignee the true owner of the goods in the declaration mentioned, in his, the said *J. B.*'s possession, order, and disposition, as the reputed owners of the same, the said goods, &c., wherefore the defendant took them as assignee under the *fiat*.

prison: a third commission (or *fiat*), issued against him, and he subsequently petitioned the Insolvent Court, made the usual assignment of his property to the provisional assignee, and was discharged. The assignee under the fiat seized the stock in trade of *A.* In an action of *trover* by the assignees under the second commission, against the assignees under the *fiat* for the conversion:—*Held*,

First. That the stock in trade having vested in the plaintiff (by virtue of the 127th section of the Bankrupt Act), he was the "true owner" of such property.

Secondly. That such property passed to the provisional assignee, by virtue of the 30th section of the Insolvent Act, as having been in *A.*'s possession at the time of his arrest, by the consent of the owner.

Thirdly. That upon an issue, whether the plaintiff was possessed of the property as assignee, it was competent to the defendant to set up the title of the provisional assignee.

Quære, whether such *fiat* was valid.

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Replication to the fifth plea, that before the issuing of the said commission, and before the 6 *Geo.* 4. c. 16 (the Bankrupt Act) came into operation, *J. B.* was in partnership with *J. B.*, the elder, in trade; that they became bankrupts, (setting out the proceedings at length); that *J. B.* duly obtained his certificate; that the estate of *J. B.*, under the second commission in the fifth plea mentioned, had not produced 15*s.* in the pound; that the goods in question were part of the estate of *J. B.*, and vested in the plaintiff as surviving assignee, under such (second) commission; and that defendant of his own wrong seized the said goods.

Rejoinder. That before the *fiat* issued, *J. B.*'s estate had produced 15*s.* in the pound.—Issue joined thereon.

The defendant gave notice of his intention to dispute the petitioning creditor's debt, and the act of bankruptcy, upon which the commission of 1828 was founded.

At the trial before *Coltman*, J., at the *Summer* Assizes for *Liverpool*, the following facts appeared in evidence. *Bakewell* being a trader in partnership, a commission of bankruptcy had issued against the partners on the 4th of *April*, 1815, under which they obtained their certificate. A second commission issued against *Bakewell*, on the 19th of *April*, 1828, under which the plaintiff, (the bankrupt's brother-in-law) and *Owen* (since deceased) were appointed assignees. The bankrupt had afterwards removed to *Manchester*, and there with the knowledge of his assignees, and without their interference, had carried on a thriving trade, in which he turned about 20,000*l.* a year. On the 12th of *October*, 1836, he was arrested for debt, and on the 29th of the same month rendered to prison in discharge of his bail. On the 8th of *November*, 1836, a *fiat* was issued against him, under which the defendant was chosen assignee. On the 21st of *December*, the bankrupt presented his petition to the Insolvent Court, and made the usual assignment to the provisional assignee; and on the 27th *February*, 1837, he was discharged under the Insolvent Debtors' Act. It was also proved, that at the time the bankrupt obtained his certificate, under the commission of 1828, his estate was insufficient to pay 15*s.* in the pound; but that afterwards, and before the act of bankruptcy in *October*, 1836, he had property enough to have paid his creditors that amount.

The plaintiff contended, that the second plea put in issue only the fact of his being assignee, and not the antecedent facts, which tended to establish his claim to that character; and he offered no evidence of a petitioning creditor's debt to support the commission, under which he had been appointed assignee. A verdict was taken for the plaintiff on all the issues; but leave was reserved to the defendant to move to set it aside, and enter a verdict for himself instead, on the second, third, and fifth issues.

C. Cresswell, in the course of last *Easter Term* had obtained a rule *nisi* upon the grounds—

First, that under the second and third issues, the plaintiff was bound to prove all the requisites to support the commission.

Secondly, that 15*s.* in the pound not having been paid under the second commission, the goods in question vested in the plaintiff, as assignee under that commission, and therefore, that he was in law "the true owner" thereof; and

having allowed them to remain in the possession, order, and disposition of the bankrupt, up to the issuing of the *fiat*, they thereby vested in the defendant as assignee thereunder.

Thirdly, that if they did not vest in the defendant, they passed to the assignee, under the Insolvent Debtors' Act, and therefore, that the plaintiff had no right to recover.

[Two other points were raised, first, whether upon the bankrupt being in a situation to pay 15*s.* in the pound, after obtaining his certificate under the second commission, the property which had previously vested in his assignees under that commission became divested; and secondly, whether the *fiat*, issued after such second commission, was wholly null and void; but as the Court pronounced no opinion upon this point, the arguments of counsel are omitted; on the part of the plaintiff were cited *Martin* v. *O'Hara* (*a*), *Ex parte Proudfoot* (*b*), *Till* v. *Wilson* (*c*), *Fowler* v. *Coster* (*d*), *Nelson* v. *Cherrill* (*e*), *Ex parte Devas* (*f*), *Thornton* v. *Dallas* (*g*): and on the part of the defendant, *Ex parte Welsh* (*h*), and cases there cited; *Todd* v. *Maxwell* (*i*), *Butt* v. *Bilke* (*j*)].

Atcherley, Serjt., and *Wightman*, now shewed cause.

First Point.

The plaintiff was not called upon either by the second or third issue, to prove the requisites of the bankruptcy. By the new rules (*k*) it is provided, that in actions by assignees of a bankrupt, the *character* in which the plaintiff is stated on the record to sue, shall not be considered as in issue, unless specially denied. Here it is denied; but nothing more is thereby put in issue than the *character* of the plaintiff as assignee, and to support the affirmative of that issue, it is sufficient to prove merely the facts of the commission having issued, and the assignment to the plaintiff, *Scott* v. *Thomas* (*l*); to hold the contrary, would be to give to the plea the same effect as the general issue had formerly.—[*Tindal*, C. J.—The declaration does not set out the trading, the petitioning creditor's debt, or the act of bankruptcy; the plaintiff merely alleges that he sues as assignee of *J. B.*, a bankrupt: how then, if the defendant wish to dispute the ingredients of the bankruptcy, is he to do so on the present record?]—He might plead that *J. B.* did not become bankrupt according to the form and effect of the Statutes, &c., as was done in *Moon* v. *Raphael* (*m*). If a plaintiff sue as clerk to a company, and the defendant says he is not clerk, is the plaintiff called upon to shew that the company is legally constituted? If an action is brought by the assignee of a bail-bond, and he describes himself as assignee of *A. B.*, Esq., sheriff of *London*; if the assignment be

(*a*) 2 Cowp. 823.
(*b*) 1 Atk. 252.
(*c*) 7 B. & C. 684; 1 M. & R. 580.
(*d*) 10 B. & C. 427; S. C. 5 M. & R. 352.
(*e*) 8 Bing. 316; S. C. 1 Moo. & Sc. 452. See also 5 M. & P. 608; 7 Bing. 663.
(*f*) 1 Mont. & Ayr. 420; S. C. 4 Deac. & Chit. 366.
(*g*) 1 Doug. 46.
(*h*) Mont. Rep 276.
(*i*) 3 B. & C. 222, S C. 5 D. & R. 258.
(*j*) 4 Bing. 240. See also *Gill* v. *Scrivens*, 7 T. R. 27; *Coverley* v. *Morley*, 16 East, 225; *Ex parte Brown*, 1 Ves. & B. 60; *Ex parte Storks*, 2 Rose, 179; 3 Ves. & B. 105; *Ex parte Robinson*, Mont. & M'Arth. 44; *Elston* v. *Braddick*, 2 C. & M. 435; 4 Tyr. 122; *Ex parte Morley*, 2 Deac. & Chit. 45; *Ex parte Hawley*, 2 Mont. & Ayr. 426.
(*k*) H. 4 W. 4, sec. 21.
(*l*) 6 C. & P. 611.
(*m*) 2 Scott, 489; S. C. 1 Hodg. 289; 2 Bing. N. C. 310; 7 C. & P. 115.

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disputed, must he shew the appointment of *A. B.*, as sheriff? or, to put an extreme case, must he even shew that *A. B.* was an esquire? In an action by an executor, if the plea denies his character as executor, he would prove it by producing the probate; it would not be necessary for him to shew the death of the testator, or the due execution of the will; yet these facts are necessary to give him the character of executor. If it be said, that it will not be presumed that probate was granted without proof of the previous facts, no more will it be presumed, that the commissioners executed the assignment without due proof of all the ingredients requisite to support the commission.

Second Point. The goods in question were not in the possession, order, and disposition of the bankrupt, with the consent of the true owner, for the assignee cannot be considered as the true owner of the goods, under the Bankrupt Act; he is only a trustee for the other creditors, and cannot be allowed to compromise their interest. The goods, therefore, are not his, for he holds them *in auter droit*, *Viner* v. *Cadell* (*n*). It is the same as if a factor were to leave the goods of his principal in the possession of a trader, who became bankrupt. The consent by which a trader is in the possession of goods, must move directly to him from the true owner, and it is not sufficient that such consent should move from another party who holds them on behalf of the owner, *Frazer* v. *The Swansea Canal Company* (*o*). By the 5 *Geo.* 2, c. 30, s. 9, where the estate did not pay 15*s.* in the pound, the bankrupt's future estate and effects remained liable to his creditors, each of whom might seize any portion of such future estate that he could obtain, *Hovil* v. *Browning* (*p*). But now, by the 6 *Geo.* 4, c. 16, s. 127, in such case the future estate vests in the assignees who are entitled to seize the same; not however on their own account, but for the benefit of the creditors at large.

Third Point. The same argument applies to the claim set up by the defendants, on behalf of the assignee under the Insolvent Debtors' Act (*q*), who also claims the goods under the 30th section of that Act, as being in the disposition of *Bakewell*, at the time of his arrest, by the consent of the plaintiff as true owner. But independent of this answer, there is another, viz., that the defendant cannot set up the *jus tertii* (*r*): he can no more set up the claim of the insolvent assignee against the plaintiff, than he could (supposing the action to be brought by the bankrupt himself,) set up the rights of the present plaintiff, as assignee, where he had not interposed, in order to defeat the bankrupt's claims, *Webb* v. *Fox* (*s*), *Drayton* v. *Dale* (*t*), *Frazer* v. *The Swansea Canal Company*.

Wilde, Serjt., (with whom were *Creswell* and *Tomlinson*), in support of the rule.

First Point. It is said that the second and third pleas put only the plaintiff's *character*,

(*n*) 3 Esp. 88.

(*o*) 1 Ad. & El. 354; S. C. 3 N. & M. 391.

(*p*) 7 East, 154; see also *Ex parte Baker*, 1 Rose, 452; *Ex parte Hodgkinson*, 2 Rose, 172; 19 Ves. 291; G. Coop. 99; *Ex parte Buckle*, 1 G. & J. 32. But in *Ashley* v. *Bill*, (A. D. 1744,) Dav. 575, cit. 1 Christ. 329, it appears that the contrary rule had been laid down by the King's Bench, and afterwards acted upon by *Willes*, C. J., at *Nisi Prius*. This case was not referred to in *Hovil* v. *Browning*.

(*q*) 7 Geo. 4, c. 57.

(*r*) See *Nelson* v. *Cherill*, 1 Mo. & Sc. 452; 8 Bing. 316; *Jones* v. *Brown*, 1 Scott, 453.

(*s*) 7 T. R. 391.

(*t*) 2 B. & C. 293, S. C. 3 D. & R. 534.

as assignee, in dispute: but whether or not he is clothed with that character, depends upon the validity of the assignment to him, and that again depends upon the validity of the commission; for if any of the ingredients of the commission fail, it is a nullity, and the assignment is wholly nugatory. The second plea denies that the plaintiff is assignee of *J. B.*, a bankrupt; if it does not put the bankruptcy in issue, it puts nothing in issue; for in order to shew that the assignment is valid, it is necessary to show the existence of numerous antecedent facts, which are all requisite to establish its validity. *Scott* v. *Thomas* is in fact an authority in favour of the defendant: the evidence which has been mentioned, was the mere formal proof of the assignment, and was held sufficient *for that purpose;* but under the issues, which were the same as in this case, the plaintiff proceeded to prove his title, as assignee, by giving evidence of the Act of Bankruptcy (the trading and petitioning creditor's debt not being disputed); he failed in doing so to the satisfaction of the jury, who returned a verdict on these issues for the defendant, which the plaintiff afterwards moved in the *Exchequer* to set aside, but the Court refused the rule. The cases that have been put, bear no analogy to the present: in the case of an executor, for instance, the Courts of law cannot enquire into the validity of the preliminaries requisite to granting the probate. In the case of the assignee of a bail-bond, the only question that could be raised, would be as to the actual fact of the assignment; but the assignee of a bankrupt acquires his title now by the operation of law, and no actual assignment takes place.

Second Point.

It is said, that the assignee is not the true owner of the property; but no authority has been adduced to support this position: it is admitted that he is trustee for the other creditors, and as such, is in law the true owner of the goods, *Darby* v. *Smith* (*b*): his case is not distinguishable from that of any other trustee, except in the fact that he has himself a beneficial interest in the property he holds in trust, which makes the case stronger against him. Who is the owner of the goods in question, if the assignee is not? They clearly do not belong to the bankrupt. If it be said they belong to the creditors at large, they have equally allowed the bankrupt to retain possession of them, so that he had them in his order and disposition, with the consent of every one who was entitled to dispute it with him, which, as was observed by *Bayley*, J., in *Fox* v. *Fisher* (*c*), is sufficient to satisfy the words of the Statute. If the plaintiff or the creditors had made any claim upon the goods, the case might have been different, *Smith* v. *Topping* (*d*); but there is no evidence of that kind in the present case.

Third Point.

As to the defendant setting up the *jus tertii*, in point of fact he does not do so, for being a creditor of the bankrupts, he is beneficially interested in the assignment to the assignee under the Insolvent Debtors' Act. He was here stopped by the Court.

TINDAL, C. J.—If this case admitted of the question as to proving the ingredients of the bankruptcy, I should be disposed to send it down for a new trial upon payment of costs; but it appears to me that the plaintiff has failed upon the third issue, which raises the main question whether he was

(*b*) 8 T. R. 82.
(*c*) 3 B. & A. 135, 137.
(*d*) 5 B. & Ad. 674; S. C. 2 N. & M. 421.

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possessed as assignee under the second commission, of the goods mentioned in the declaration. By the 127th sec. of the Bankrupt Act (*e*), it is enacted, "That if any person who shall have been discharged by certificate, or who shall have compounded with his creditors, or who shall have been discharged by any Insolvent Act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission 15*s.* in the pound, such certificate shall only protect his person from arrest and imprisonment; but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing of the commission." If that section stood alone, it might be contended that the words were strong enough to entitle the assignees, under a second commission, when the bankrupt's estate had not paid 15*s.* in the pound, to seize the future acquired property at any time; then the 72d sec., which relates to goods being in the reputed ownership of the bankrupt, seems to me to bear materially upon this question: that section enacts, "That if any bankrupt, at the time he becomes bankrupt, shall by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission." We are called upon to determine therefore, whether this section applies to the present case. It appears that from the time of the second commission under which the plaintiff was chosen assignee down to the period of the bankrupt's rendering to prison, a short time before the issuing of the *fiat* under which the defendant was chosen assignee, the bankrupt was allowed by the plaintiff and his co-assignees to carry on trade to a large amount; they might at any time have interposed and seized the property, but they voluntarily abstained from doing so, and it was clearly with their consent that it remained in the possession, order, and disposition of the bankrupt. The question therefore is, whether the plaintiff, being the surviving assignee under the former commission, is to be considered the true owner of such property within the meaning of the 72d section of the Bankrupt Act; and I confess, neither upon principle nor authority, can I see any thing peculiar in the character of an assignee to distinguish him from an ordinary trustee. A man may be appointed trustee under a common deed of assignment, and as such, would be in law the true owner of the property assigned to him; and I can see no reason why, if the trustee, clothed with a legal character, permits a party to remain in the possession of goods till he becomes insolvent or bankrupt, his case should not come within the same principle as that of an ordinary trustee. The injury to the world would be the same; the effect of the transaction is, that the legal owner has lent the property to the bankrupt, who appears possessed thereof in his own right; and there would be the greatest injustice to the subsequent creditors, if it were held that the assignees might allow the bankrupt to trade on the credit of property which had vested in them, and

(*e*) 6 G. 4, c. 16.

afterwards, at any convenient time, might seize that property and leave the new creditors wholly destitute. If then, such be the operation of these two sections, the property would pass to the defendant, as assignee under the *fiat*, if such *fiat* is valid; but it becomes immaterial to decide that question, as I am of opinion that the property would pass to the assignee under the Insolvent Act, by virtue of the 30th section of the 7 *G.* 4, c. 57, as being in *Bakewell's* possession at the time of his arrest by the consent of the true owner. It has been argued, that the defendant cannot set up the *jus tertii* and rely upon the title of the insolvent assignee; but that has been sufficiently answered by saying that the defendant here is not to be regarded in the light of a stranger, for he is a creditor of the bankrupt's; and if the *fiat*, and consequently the assignment to him, the defendant, be bad, he will have a right to come in as a creditor under the insolvency. Nor do I think it clear, that a party in all cases is precluded from setting up the *jus tertii*; but it is not necessary to enter upon that point; and being of opinion therefore, for the reasons above stated, that the plaintiff is not entitled as assignee in manner and form, as he has alleged; and as the verdict upon the second and third issues will be sufficient to decide the rights of the parties, it is not necessary to decide the other questions: let the rule therefore be made absolute as to those two issues, and the jury be discharged as to the fifth issue.

VAUGHAN, J.—This is an application to enter a verdict for the defendant, on the second, third, and fifth issues. Upon the last of these, for the reasons which have just been given by the Lord Chief Justice, it is not necessary to enter. The remaining issues are, whether the plaintiff is assignee, and whether he was possessed as such assignee of the goods mentioned in the declaration. The first question therefore is, whether the plaintiff has made out any case to shew that he was clothed with the character of assignee; and I am of opinon, that he has failed to do so, inasmuch as he neglected to prove one of the ingredients necessary to give validity to the commission, under which he claims as assignee; for I think his *title*, and not merely his *character*, is in issue. If there were any reason for supposing that the plaintiff had been surprised at the trial, by being called on to prove his title, he might be let in, upon the usual terms; but there is no pretence for such a supposition, as he had notice that the defendant intended to dispute *both* the petitioning creditor's debt, and the act of bankruptcy. The most important question is the second, *viz.*, whether the plaintiff was possessed of the goods in question as assignee; and looking at the 127th sec. in connection with the 72d sec., I think that he has failed also upon that issue. By the 127th sec., the after acquired property of the bankrupt absolutely vested in the plaintiff as assignee, but instead of attempting to seize it, or laying any claim to it, he lies by and allows the bankrupt to remain in the uncontrouled and absolute disposition of the property, and to trade to a large extent upon a false and delusive credit; and now attempts to turn round upon the creditors who have trusted the bankrupt and deprive them of their just rights; then, by the operation of the 72d section, such property being so in the possession of the bankrupt with the consent of the plaintiff, who was the legal owner thereof, it would pass to the assignee of a subsequent *fiat*, supposing such *fiat* to be valid; that however, is a very grave question, which it is not necessary to decide, for under the 30th section of the Insolvent Act, which is to the same effect as

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the 72d section of the Bankrupt Act, the property in question, if it did not vest in the defendant as assignee under the *fiat*, would vest in the provisional assignee of the Insolvent Court. But then it is said, the defendant cannot set up the *jus tertii* against the plaintiff; but what is the issue between them; the plaintiff says the goods in question are my property; the defendant says, they are not your property; and to prove this, he shews they are the property of another, and this it is fully competent to him to do for the purpose of negativing the plaintiff's averment. The plaintiff, therefore, has not made out his case, and the defendant is entitled to his verdict on the second and third issues.

BOSANQUET, J.—I am also of opinion, that the verdict must be entered for the defendant on the second and third issues. Upon the second, I think the plaintiff has failed in establishing that he was assignee, by not proving all the ingredients requisite to support the commission of 1828; but the material question arises upon the third issue, whether the plaintiff was possessed of the goods in question, as of his own property. Now assuming, that by the operation of the 127th section of the Bankrupt Act, the plaintiff was entitled to take this property, on the ground that 15*s.* in the pound had not been paid under the commission, in which he was assignee; yet they were left in the possession of the bankrupt as reputed owner, with the consent of the true owner; for the true owner was either the assignee under the second commission, or the assignee under the insolvency. I cannot entertain any doubt, that under the circumstances the assignee under the second commission is to be considered as the true owner within the meaning of the Bankrupt Act; a contrary construction would place such assignee, and the new creditors in a most unjust relation towards each other; as the honest claims of the latter would be wholly defeated by the assignee, if he chose to seize the property at any convenient moment; a construction so obviously inconsistent with the principles of justice, that it could only be adopted upon the strongest and most compulsory language of the Statute. These reasons are sufficient to satisfy me that the plaintiff was not possessed of the goods in question, as of his own property, at the time of the third bankruptcy. With respect to the defendant's setting up the title of the assignee under the Insolvent Act, I think the defendant was entitled to do so, in order to shew that the goods were not the property of the plaintiff; that they were in fact the property of a third party. I agree also that, as to the last issue, it is not necessary to give any opinion.

COLTMAN, J.—As regards the question raised by the second plea, whether or not the plaintiff was assignee, I have entertained some doubt in the course of the argument, as to the extent of proof required on the part of the plaintiff; but I am disposed to adopt the construction which the rest of the Court have put upon the plea, and think that by the new rules, it puts in issue all the matters essential to give the plaintiff the legal character of assignee. The third issue, however, gives rise to the most important question. It appears to me, that a bankrupt's assignee must be considered as a mere trustee for the other creditors, and that he has no peculiar privilege by virtue of his character as assignee; he is liable to account to his *cestuis que trust*, and must in law be considered as the "true owner" of the property,

which he takes under the assignment. I forbear giving any opinion as to the validity of a third *fiat*, where under a second bankruptcy the estate hasnot produced 15*s.* in the pound, as it is *a vexata questio*, and not necessary to be determined in the decision of the present case; for supposing such third *fiat* to be invalid, then at any rate the bankrupt's property would have vested in the insolvent assignee. As to the objection that has been raised on this point, I am not myself aware of any general rule by which a party is precluded from setting up the *jus tertii*; it is true, that if parties stand in a particular relation to each other, such as agent and principal, tenant and landlord, the former cannot set up the rights of third parties against the latter; but I should be inclined to say, that these were rather the exceptions of the general rule, than the rule itself.

Rule absolute on the second and third issues.

GAYLER *v.* FARRANT and others.

Jan. 29.

REPLEVIN. Avowry for three quarters of a year's rent at 115*l.* yearly, payable quarterly. *Pleas in bar:—Non tenuit* and *riens in arrere.*

In *replevin*, the defendants avowed for three quarters' rent, at a yearly rent of 115*l.*, payable quarterly; the plaintiff paid into Court 75*l.* as three quarters' rent, at a yearly rent of 100*l.* The jury found the rent was 115*l.* a year, payable half-yearly, and the finding was indorsed on the record. The Court allowed the defendants to amend their avowry, upon payment of costs, by changing the averment that the rent was payable "quarterly" to "half-yearly."

The defendants had given the plaintiff notice, that if, at the trial, any variance should appear between the terms of the tenancy in the avowry and the evidence, either as to the amount of rent or the periods at which it was payable, they should apply to amend.

The plaintiff, who insisted that the rent was only 100*l.* a year, paid 75*l.* into Court for three quarters' rent, and gave the defendants notice, that if any such variance as above referred to should appear, he should oppose the amendment.

At the trial, before *Tindal*, C. J., the jury found that the rent was 115*l.* a year, payable half yearly; and this finding was indorsed on the record in pursuance of the Statute 3 & 4 *W.* 4, c. 42, ss. 23 & 24.

Crowder, in last *Michaelmas Term*, obtained a rule *nisi*, to amend the avowry, by stating that the rent was payable quarterly.—Payment of money into Court in replevin was quite a modern practice, *Hopkins* v. *Shrole* (*a*); but as the plaintiff had done so in this case, he thereby admitted the amount of rent as claimed in the avowry, upon the same principle that payment into Court upon a special contract, admitted such contract, *Reid* v. *Dickens* (*b*).

Wilde, Serjt., and *Barstow*, now shewed cause.—The jury have found in fact against the defendants; they claimed by their avowry, three quarters of a year's rent, at 115*l.* a year; the jury have found that the rent was 115*l.* a year, but that it was payable half-yearly; the defendants, therefore, were not justified in distraining for three quarters' rent. The general rule is, that when the defendant does not establish the terms of the holding, as laid in his avowry, he must fail on the issue of *riens in arrere.* The mode of payment

(*a*) 1 B. & P. 382.

(*b*) 5 B. & Ad. 499; S. C. 2 N. & M. 369.

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can no more be said to be "immaterial to the merits of the case," than the amount of rent; and a variance as to that would be fatal, *Brown* v. *Sayce* (*c*). The plaintiff had given express notice that he should oppose the present application; the defendants, therefore, ought to have amended before they went to trial.

Crowder, in support of the rule, was stopped by the Court.

TINDAL, C. J.—It appears to me, that this case falls within the spirit of the 23d and 24th sections of the Statute. Whether or not the amendment sought to be made is material to the merits of a case, must mainly depend on the course taken at the trial. The real and substantive question between the parties in this case is, whether the amount of the rent was 115*l.* or 100*l.* yearly. The plaintiff made no objection to the course adopted at the trial; and certainly he was not prejudiced by that course, as every particle of evidence was admitted which could benefit him. The present objection on his part rests entirely upon a point of form, and I think it ought not to succeed. The landlord gave distinct notice that he should seek to amend the terms of his avowry if it were necessary, and the tenant told him he should oppose such application; this, therefore, left the question in the same situation it was in before. Upon the whole, I think justice will be satisfied by allowing the defendant to amend his avowry, upon payment of costs, by altering the allegation of a quarterly to a half-yearly payment.

The other judges concurred.

Rule absolute accordingly.

(*c*) 4 Taunt. 320.

Jan. 30.

WHITAKER and others *v.* MASON.

The plaintiff brought an action upon a special contract to deliver bills of exchange as a security for goods sold: there was a demurrer to part of the pleadings, upon which the defendant obtained judgment; the costs of which were hung up until the trial of the issues in fact: before such trial, the defendant became bankrupt, and obtained his certificate, the plaintiff having proved for the amount of the goods. The plaintiff not proceeding to trial, the defendant's attorney proposed to take the cause down by proviso, whereupon the plaintiff applied to stay the proceedings. The Court ordered a *stet processus* to be entered upon payment of the costs of the demurrer by the plaintiff.

DECLARATION in *special assumpsit*, delivered 28th *January*, 1835, upon a contract to give bills of exchange as a security for the payment of certain books, sold by the plaintiff to the defendant. To this there were several pleas, to one of which the plaintiff replied *de injuriâ*; and to this the defendant demurred: the Court gave judgment in his favour in *Michaelmas Term*, 1835 (*a*).

The defendant's proceedings for the costs upon the demurrer were stayed, by a judge's order, till after the trial of the issues in fact. The plaintiff had given notice of trial for the sittings after *Michaelmas Term*, 1835, but afterwards countermanded it.

In *December*, 1835, the defendant became bankrupt: the plaintiffs proved

(*a*) See 1 Hodg. 319; 2 Bing. N. C. 359; 2 Scott, 567.

for the price of the goods under the *fiat*, and were chosen assignees. In *March*, 1836, they received a dividend of 1*s.* 1*d.* in the pound; and the defendant, in *September*, 1836, obtained his certificate, which was signed by the plaintiffs. In *November*, 1837, the defendant's attorney gave notice of his intention to proceed to the trial of the cause by *proviso*, unless the costs of the demurrer, upon which he claimed a *lien*, were paid, whereupon

Wilde, Serjt., had obtained a rule *nisi* to stay all further proceedings in the cause, on the ground that the defendant had become a bankrupt, and obtained his certificate.

Kelly, now shewed cause.—The action was not maintainable at the time it was instituted; the plaintiff cannot debar the defendant from his defence to the action, and deprive him of the costs which are due to him upon the demurrer.—[*Vaughan*, J, referred to the 59 sec. of the Bankrupt Act (*b*), by which it is enacted, that "no creditor who has brought any action against any bankrupt, in respect of a demand prior to the bankruptcy, shall prove a debt under such commission without relinquishing such action; and the proving a debt under a commission by any creditor shall be an election by such creditor to take the benefit of such commission with respect to the debt so proved. Provided that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action so relinquished by him."]—That section only applies to cases where the action is properly brought for a *present* debt.

Wilde, Serjt., in support of the rule, contended that the action was maintainable, being brought not for a debt, but for a breach of the special contract in not delivering the bills. The affidavits on the other side shewed no authority from the defendant for proceeding with the action. If the plaintiff proceeded to trial and obtained a verdict, he would have no means of obtaining his costs from the defendant.

TINDAL, C. J.—We have no right in ordinary cases to interfere with a defendant's privilege of taking down a cause to be tried by *proviso*; it is a method which the law has given him to prevent a cause hanging over his head for an indefinite period. The first question here is, whether this case comes within the operation of the 59 sec. of the Bankrupt Act; the second will be, whether the present proceedings are to be considered as emanating from the bankrupt. I certainly should feel a difficulty in saying, that this was a case contemplated by the Bankrupt Act. The action is brought in *January*, 1835, for not giving certain bills of exchange according to a contract; if the parties had then gone to trial, the plaintiff could only have recovered damages for the breach of such contract. I am not prepared to say that the jury might not have taken the value of the books (as a security for which the bills were to have been given) as the measure of such damages. The plaintiff, however, has elected to go before the commissioners and prove for the value of the books; which he clearly was entitled to do under the Bankrupt Act (*c*); but I cannot say that such proof was exactly in respect of the

(*b*) 6 G. 4, c. 16. (*c*) Sec. 51.

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same "demand," for which the action was brought. With regard to the second point, it appears that the defendant became bankrupt two years ago, and that he obtained his certificate in *September*, 1836; and there is no affidavit that he now puts the process of the Court in motion. Suppose he should lose the cause, the plaintiff would have no remedy for his costs; for the attorney would not be liable for them, and the defendant is a certificated bankrupt. It appears to me, that the justice of the case will be best answered by taking a middle term: the costs of the demurrer have been hung up till the trial, which, *ex concessis*, it is not desirable should now take place; but that is no reason why the plaintiff should have them. Upon payment, therefore, of such costs, let a *stet processus* be entered; otherwise the rule must be discharged.

Rule accordingly

BURTON *v.* CAMPBELL.

Where the defendant applies to deprive the plaintiff of his costs under a Court of Requests Act, and it appears by a copy of the writ of summons annexed to the defendant's affidavit, that the action was brought for a sum which might have been recovered in such Court, the defendant need not swear to that fact.

Where the defendant in such an application, describes himself in his addition as of a tavern at *G.*, within the hundred of *B.*, and afterwards in the body of his affidavit states he was resident at the above tavern, this is a sufficient averment of residence within the hundred, and supersedes the necessity of a positive allegation, that he resided within the jurisdiction.

Where the defendant positively swears to the above facts, it is not sufficient for the plaintiff to deny them upon information and belief.

BY the *Blackheath* Court of Requests Act, 6 & 7 *W.* 4, c. 120, s. 21, the Commissioners appointed thereunder are empowered "to decide and determine all disputes and differences between party and party, for any sum not exceeding *5l.* in all actions of debt and assumpsit." By sec. 28, "it shall be lawful for any person who shall have any debt owing to or claimed by him, and for which debt he shall claim any sum of money from any person whomsoever, *residing, inhabiting*, or *being* within the said hundreds (of *Blackheath*), or keeping or using any house, &c., or employed, working, or seeking a livelihood, or usually trading or dealing within the same hundreds, to apply to the clerk of the said Court," who was thereupon to issue a summons to the defendant, &c. By sec. 74, "If any action or suit for any amount recoverable in the said Court of Requests shall be sued or prosecuted in any of His Majesty's Courts at *Westminster*, or elsewhere, out of the said Court of Requests; and it shall appear to the judge or judges of the Court in which such action or suit shall be tried, that at the time of commencing such action or suit, the defendant was within the jurisdiction of the said Court of Requests, and was liable to be warned and summoned before the said Court for such debt or demands; then and in such case the said judge shall not allow to the plaintiff any costs of suit, but shall award the said plaintiff to pay such costs to the defendant as such defendant shall justly prove before such judge or judges that he hath incurred and been put to, in the defence of such action or suit."

Price, upon a former day in this Term, had obtained a rule under the above Act, calling upon the plaintiff to shew cause why he should not be disallowed his costs of suit, and why he should not pay such costs to the defendant, together with the costs of the rule. He produced affidavits made by the defendant and other persons. The defendant in his addition, described himself

"of the *Mitre Tavern, Greenwich*, in the hundred of *Blackheath*;" and it was stated in the affidavits sworn on his behalf, that from the 16th till after the 21st of *October*, (when the writ was sued out,) he was wholly residing at the above tavern, and was liable to be sued in the said Court of Requests, and that the plaintiff well knew of his said residence, and that he, the defendhad been served with a writ in a tavern in *Fleet-street*, where he was by accident. It appeared from the writ of summons, which was annexed to the defendant's affidavits, that the action was brought for 4*l.* 2*s.* 5*d.*

Arnold now shewed cause.—He took two objections to the defendant's affidavits. *First*, there was no averment that the sum sued for and recovered was under 5*l.* [*Tindal*, C. J.—That appears from the writ of summons annexed to the affidavits.]—*Secondly*, there was no direct averment that the defendant was living within the jurisdiction of the Court of Requests at the time the action was commenced, so as to bring himself within the operation of the 74 sec. The defendant was bound to bring himself distinctly and expressly within the words of the Act, *Skinner* v. *Davis* (*a*), *Newton* v. *Peacock* (*b*).—[*Tindal*, C. J.—The defendant having described himself as of the *Mitre Tavern, Greenwich*, in the hundred of *Blackheath*, states afterwards in his affidavit, that he was residing at the above tavern: this I think is sufficient to bring it within the operation of the Act.]—He then produced affidavits on the part of the plaintiff, by which it appeared that the debt was due for board and lodging; that the defendant, on quitting his house, went to reside at the "*Johnson's Head Tavern, Bolt Court, Fleet-street*," and continued to reside there until after the 1st of *November*, as the plaintiff had been informed by the landlord and a waiter; that the writ was served upon the defendant in his sleeping room at that tavern on that day, and that he had pleaded in person and delivered his plea, dated 4th of *December*, indorsed, "*Campbell*, 52, *Burton-street, St. Pancras*."

Price was heard in support of the rule.

TINDAL, C. J.—The only question in this case is, whether within the terms of the Act of Parliament, it appears to the satisfaction of the Court, that "at the time of commencing the action, the defendant was within the jurisdiction of the said Court of Requests, and was liable to be warned and summoned before the said Court for such debt." Now the defendant swears positively, and he is corroborated in this by other persons, that at the time of the issuing of the writ of summons he was residing at the above tavern, which he has previously described as the *Mitre Tavern, Greenwich*, in the hundred of *Blackheath*, and that he was liable to be summoned before the Court. This allegation is not positively denied on the part of the plaintiff, for he only states what he has received from the information of other parties, who do not however come forward to make any affidavit. I regret to say, therefore, that we have no discretion in this case, and the rule must be made absolute.

PARK, J.—The word "being," in the 28 sec. of the Act, is a very awkward one for the plaintiff. I do not mean to say that the mere transit through

(*a*) 2 Taunt. 196. (*b*) 1 D. P. C. 677.

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the jurisdiction would be sufficient to bring a case within the operation of the Act, but it might be a question, whether absolute residence was necessary. *That*, however, is sworn to in this case, though certainly for a very limited period; but as it is not contradicted by the plaintiff, we cannot discharge the defendant's rule.

VAUGHAN, J.—The plaintiff had the opportunity of swearing last; and if he could have done so, he might have denied the defendant's residence within the jurisdiction: as he has not done so however positively, the defendant's statement must be taken as uncontradicted.

BOSANQUET, J.—I remember this case was before me at chambers, and I then thought it did not sufficiently appear that the defendant was resident within the jurisdiction at the time of the commencement of the action; that defect, however, has been since supplied by a supplementary affidavit, and it does distinctly appear, that he was residing there from the 16th *October* till after the 21st, when the writ was tested. As to the residence at the *Johnson's Head*, it is only spoken to upon information.

Rule absolute.

Jan. 30.

BURLEIGH *v.* ENGLAND.

Where a sheriff (having, under an execution, seized goods claimed by a third party,) obtains an Interpleader rule, the Court will not stay proceedings against him, instituted by the claimant, unless the sheriff has given him notice of his application.

If after the rule *nisi* has been obtained, the sheriff withdraws from possession by the directions of the execution-creditor, and subsequently comes to make the rule absolute, the Court will make him pay the plaintiff's costs, but not those of the execution-creditor.

KENNEDY, on a former day in this Term (*January* 23d), had obtained a rule *nisi*, under the Interpleader Act, on behalf of the defendant (a sheriff, who had, under an execution, seized goods claimed by the plaintiff), calling upon the plaintiff and the execution-creditor to appear and state their claims; but as no notice had been given to the plaintiff of the intended application, the Court refused to stay the proceedings.

Wilde, Serjt., now appeared for the plaintiff, and *Barstow* for the execution-creditor, when it appeared, that on *January* the 25th, the sheriff had withdrawn from possession, by the direction of the execution-creditor.

Wilde, Serjt., prayed for costs on behalf of the plaintiff, inasmuch as the sheriff ought not to have brought him before the Court, but ought to have abandoned the rule after he had withdrawn from possession.

Kennedy contended, that it was necessary to bring the parties before the Court, in order to bar the claim of the execution-creditor, and in order that the Court might stay the action commenced by the plaintiff. The plaintiff had been nowise damnified by the course adopted. The claimant had delivered his brief to counsel before the sheriff was directed to withdraw.

TINDAL, C. J.—The plaintiff has been damnified by being obliged to attend by counsel. The Court cannot take notice of the fact about the delivery of the brief. The sheriff, when he withdrew from possession, should have given

notice to the plaintiff not to appear. The sheriff, therefore, must pay the plaintiff his costs.

Barstow then applied for the costs of the execution-creditor.

TINDAL, C. J.—He has no right to them. It was his own fault that he appeared after having abandoned his title.

Rule accordingly.

PISANI *v.* LAWSON.

Jan. 30.

A rule to plead several matters according to an abstract delivered, having been obtained by consent, one of which was that the plaintiff was "an alien;" the defendant delivered a plea to the effect that the plaintiff was "an alien born:" the Court refused to strike out such plea.

THIS was an action of libel, by a dragoman of *Turkey*, against the publisher of the *Times* newspaper.

The defendant had obtained time to plead on the usual terms, and also a rule to plead several matters; and in the abstract delivered was one, that the plaintiff was "an alien."

The plea delivered was to the effect, that the plaintiff was an alien born, that he had never been naturalized or domiciled in this country, and that he did not trade here as a merchant or otherwise.

J. W. Smith, on a former day in this Term, had obtained a rule *nisi*, to strike out this plea, or to sign judgment notwithstanding, upon the ground, *First*, that the plea was not issuable; and, *Secondly*, that it was virtually a plea in abatement, and therefore, having been delivered after four days from the date of the declaration, was irregular.

Wilde, Serjt. (with whom was *Platt*,), now shewed cause.—The defendant's mode of application was incorrect; he should have demurred if he thought the plea objectionable. It appeared also, that the rule to plead several matters had been obtained by consent of the defendant. He was stopped by the Court.

J. W. Smith in support of the rule.—Although in *Smith* v. *Backwell* (*a*), *Park*, J., said, "In future, on a rule to plead several matters, we shall require the substance of the pleas to be stated to us, in order to ascertain whether they are fit pleas to put on the record or not;" and the same rule was afterwards recognized in *Jones* v. *Studd* (*b*); yet in practice, especially since the rule of T. 1 *W.* 4, s. 13, the rule to plead several matters was obtained almost as a matter of course. In *Bones* v. *Punter* (*c*), it was stated, that such a rule was always a matter of course in the *King's Bench*.—[*Tindal*, C. J.—In this Court it has in most cases been a rule *nisi* (*d*).]—As to the rule having been drawn up by consent, the abstract gave no notice to the

(*a*) 4 Bing. 512; S. C. 1 M. & P. 338.

(*b*) 4 Bing. 663; S. C. 1 M. & P. 643.

(*c*) 2 B. & A. 777.

(*d*) See *Tidd's* Prac. 9th ed. 484—6 488; 657, 8.

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plaintiff of the real nature of the plea, whether it would be in abatement or in bar; it merely stated that the plaintiff was an *alien*, and gave no explanation of that term. The plea is clearly bad.—[*Bosanquet*, J.—Supposing it is, can we strike it out upon motion?]—When a plea is palpably out of the regular course, the Court will do so, *Blewitt* v. *Marsden* (*e*).

TINDAL, C. J.—I can see no reason in this case why we should deprive the defendant of his writ of error; which we should do if we were to accede to the present application, and strike out this plea upon motion. I abstain therefore from giving any opinion upon the present occasion, whether the plea be good or not; but if it be good, I take it, it must be a plea in bar, for it is not like the plea of *alien* enemy.

The other judges concurring;

Rule discharged.

(*e*) 10 East, 237.

Jan. 30.

BARTRUM *v.* WILLIAMS and two others.

Three defendants were arrested upon a promissory note; one of whom, the administratrix of one of the makers, was discharged. The plaintiff declared against the other two only, who took several steps in the cause:—*Held*, on an application to set aside the declaration, that the irregularity in the declaration was waived on behalf of the two; the third defendant not being properly before the Court.

Quære, where a party has been arrested, who by law ought not to have been, whether in an action for a malicious arrest, it is necessary to shew the determination of the former suit.

THIS was an action upon a promissory note, made by two of the defendants and a third party deceased, to whom the defendant *Williams* was administratrix. All the three defendants had been arrested; the administratrix after remaining in jail a week, was discharged under a judge's order, upon entering a common appearance; the other two defendants remained in prison The attorney who acted on behalf of all three defendants, had demanded a declaration, which was delivered against two only, omitting the defendant *Williams*; and the other two defendants had since obtained time to plead, and taken several other steps in the cause.

E. V. Williams, on a former day in this Term, applied on behalf of the defendant *Williams* for a rule to shew cause why the declaration and all subsequent proceedings should not be set aside, on the ground of irregularity. A similar application had been made to *Bosanquet*, J., at chambers, who had referred the matter to the Court. The object of the application was, that the defendant *Williams*, might *non pros.* the plaintiff, with a view to bringing an action against him for a malicious arrest. At the suggestion of the Court, the learned counsel took the rule *nisi*, on behalf of all three defendants.

Butt now shewed cause.—He contended, that the application, being made on behalf of all three defendants, could not be acceded to, as there was no declaration against one of them; and insisted that the various steps which had been taken since the delivery of the declaration, amounted to a waiver of any irregularity. He was stopped by the Court.

E. V. Williams, in support of the rule.—The defendant *Williams* ought not to suffer by the *laches*, if any, on the part of the other defendants; but

the writ being against three, and the declaration against two only, it was an irregularity which was not waived, by the two defendants having obtained time to plead, *Woodcock* v. *Kilby* (*a*). Besides, the rules as to waiver of irregularities was not applied so strictly in the case of prisoners, as in other cases, *Rock* v. *Johnson* (*b*), *Taylor* v. *Slater* (*c*). The *non pros.* in the action can only be entered against all three defendants; and, unless it is entered, the administratrix, who has been most improperly arrested, will be deprived of her remedy for that injury.

TINDAL, C. J.—I do not wish to give any opinion on that point; but it may be, that where a party has been arrested, who by law ought not to have been, it might not be necessary to shew the determination of the former suit: but I think we must consider this as an application by two defendants to set aside a declaration against them for irregularity; for the third defendant, *Williams*, is not properly before the Court. Now with regard to those two defendants, it appears there has been a continued series of waivers of the irregularity on their part, long after they must have known their rights. The rule, therefore, must be discharged.

The other judges concurred.

Rule discharged.

(*a*) 1 M. & W. 41; S. C. 1 Gale, 405; 4 D. P. C. 730.
(*b*) 4 D. P. C. 405; S. C. 1 Tyr. & Gr. 43.
(*c*) 2 Scott, 839. And see *Sharpe* v. *Johnson*, 1 Hodg. 298; 2 Bing. N. C. 246; 2 Sc. 405; 4 D. P. C. 324, *acc.*: *Primrose* v. *Baddeley*, 2 C. & M. 468; 4 Tyr. 370; 2 D. P. C. 350; *Fowell* v. *Petre*, 2 Har. & Wol. 379; 1 N. & P. 227; 5 D. P. C. 276; *Robins* v. *Grant*, 1 Wil. Woll. & Dav. 373, *cont.*

DOE, dem. JOHN SIMPSON and MARY ROTHERY *v.* THOS. SIMPSON, MARY BLESARD, DORINDA SIMPSON, TRUZWELL CARTLEDGE and EDWARD EARNSHAW.

Jan. 31.

THIS was an action of ejectment, and the following facts were submitted for the opinion of this Court, in the form of a special case:—

John Simpson, of *Knaresborough*, in the county of *York*, surgeon, being seised in his demesne as of fee of certain freehold premises in the said county, and being also seised in fee, according to the custom of the *manor* of *Knaresborough*, of certain copyhold premises, which he had duly surrendered to the use of his will at a Court holden for the said manor, on or about the 5th of *May*, 1803; and being also seised in fee according to the custom of the *forest* of *Knaresborough* of the residue of the premises, which were parcel of the said forest, and which he had also duly surrendered to the use of his will, on the said 5th of *May*, 1803; by his last will and testament in writing, bearing date the 12th of *December*, 1803, duly executed, after bequeathing the interest of 2,600*l.* to his wife for life, and the principal, after her death, to her children absolutely, and after devising a freehold estate at *Hampsthwaite*, then

A devise of copyhold premises, (where there was no custom to entail) to the testator's son, *J. S.*, (who was his heir-at-law) "and his heirs, but if he should die without leaving any child or children," then over to five illegitimate children of the testator:—*Held*, that *J. S.*, under this devise, took a conditional fee at common law, which merged the former estate in the possibility of reverter cast upon him by descent, (as heir-at-law of the testator), and gave him the fee-simple.

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If the Court should be of opinion, that under the will of the said *J. S.*, surgeon, the premises in question, on the death of Dr. *J. S.* without issue, vested in *Mary*, the wife of *J. B.*; *T. S.*; *F. K. S.*; *D. A. S.*; and *D. S.*, the verdict was to be entered generally for the defendants.

If the Court should be of opinion, that on the death of Dr. *J. S.* without issue, the premises in question descended on the right heir of *J. S.*, surgeon, then the verdict was to be entered for the lessors of plaintiff on the demise of the said lessor *J. S.*, and for the defendants on the other demise.

If the Court should be of opinion that a title had not been proved in either of the lessors of the plaintiff, then a verdict was to be entered generally for the defendants.

Sir *W. Follett*, for the lessors of the plaintiff, contended, that Dr. *J. S.* took under the will a fee conditional at common law, which merging in the possibility of reverter in him, (as heir at law of the testator,) he took an absolute fee simple.

First; If the premises in question had been *freehold*, the words of the devise would have conferred an estate tail upon Dr. *J. S.*, with a limitation over to the five illegitimate children, so that he might have suffered a recovery, barred the limitation over, and had the absolute disposal of the estate. The rule is laid down in *Powell on Devises*, (*b*), that "expressions referring to a dying *without issue*, are construed to import a *general indefinite failure of issue*, *i. e.* a failure of issue *at any period*; consequently, following a preceding devise to the person whose issue is so referred to, they create in him an *estate tail*." The author proceeds to say, that "where the expression used is *leaving* no issue, applied to *real* estate, it also means an *indefinite failure of issue*," although the rule is different where the expression is applied to *personal* estate, *Walter* v. *Drew* (*c*), *Brice* v. *Smith* (*d*), *Doe*, dem. *Ellis* v. *Ellis* (*e*), *Dansey* v. *Griffiths* (*f*), *Doe*, dem. *Scott* v. *Roach* (*g*). There are certain cases, which are exceptions to this rule, where expressions are used, which manifestly import that the failure of issue contemplated by the testator, was a failure at the time of the death of the devisee; in these cases, in order to give effect to the intention of the testator, the words are held to create an executory devise, *Pells* v. *Brown* (*h*), *Porter* v. *Bradley* (*i*), *Glover* v. *Monckton* (*j*), but none of these exceptions have any application to the present case. The effect of the decisions is, that the word "heirs," when coupled with the condition of dying without issue, means *heirs of the body*. The words in the present devise are, "without leaving any child or children," but they are equivalent to the expression, "without leaving any *issue*," *Broadhurst* v. *Morris* (*k*), and the cases there cited; especially *Wilde's* case (*l*), *Davie* v. *Stevens* (*m*), *Doe*, dem. *Smith* v. *Webber* (*n*).

Secondly; where the words used would create an estate tail, if the premises were *freehold*, they create a conditional fee, if the premises are *copyhold*, and there is no custom of entailing in the manor, *Rowden* v. *Mals-*

(*b*) Ed. *Jarman*, vol. 2, 565; the whole of the 2d volume is by Mr. *Jarman*, see Editor's preface, xi.
(*c*) Com. R. 372.
(*d*) Willes, 1.
(*e*) 9 East, 382.
(*f*) 4 M. & S. 61.
(*g*) 5 M. & S. 482.
(*h*) Cro. Jac. 590.
(*i*) 3 T. R. 143.
(*j*) 3 Bing. 13; S. C. 10 Moo. 453.
(*k*) 2 B. & Ad. 1.
(*l*) 6 Rep. 17, b.
(*m*) Doug. 321.
(*n*) 1 B. & A. 713.

ter (*o*), *Pullen* v. *Middleton* (*p*), *Moore* v. *Moore* (*q*), *Roe*, dem. *Crow* v. *Baldwere* (*r*), *Doe*, dem. *Spencer* v. *Clark* (*s*).

Thirdly. A remainder cannot be limited upon a conditional fee at common law, even though the condition be not performed; such a limitation after even a base or qualified fee being void. The statute *de donis* (*t*), introduced a new kind of inheritance (that in *fee-tail*), which admits of a remainder over. *Co. Litt.* 18, a, 19, b. *Winchester's* Case (*u*), *Willion* v. *Berkley* (*v*), 2 *Inst.* 336. *Bole* v. *Horton* (*w*), *Earl of Stafford* v. *Buckley* (*x*), *Badham* v. *Shee* (*y*), *Bishop of Sodor and Man* v. *E. of Derby* (*z*). Therefore, if Dr. *J. S.* takes a fee conditional, it would merge in the possibility of reverter in him as heir at law, and he would take an absolute fee. The whole of this third proposition was conceded by the counsel for the defendants.

Starkie, for the defendants.—Dr. *J. S.* took an estate in fee, subject to the executory devise to the five illegitimate children. The case turns upon the effect to be given to the words, "if my son Dr. *J. S.* shall die without leaving any child or children." The general rule is, that words in a will are so to be construed, as best to effectuate the testator's meaning, provided such construction be not opposed to any technical rule of law; the words of this devise, *naturally* mean dying *without leaving any children living at the time of the devisee's death;* and the natural construction is the best to adopt, *Pinbury* v. *Elkin* (*a*). That was the case of a claim of *personalty;* and the general distinction referred to on the other side as to a different mode of construction, with regard to *realty* and *personalty* is admitted. In cases of *freehold*, the *technical* or *artificial* construction is adopted, *Purefoy* v. *Rogers* (*b*); and words of this description are construed to mean an *indefinite failure of issue*, but applied to *personal estate*, they import, leaving issue at the death, according to the *natural* or *vulgar* construction, 2 *Powell on Devises*, 566, *Denn*, d. *Geering* v. *Shenton* (*c*), *Goodtitle*, d. *Peake* v. *Pegden* (*d*), *Crooke* v. *De Vandes* (*e*), *Campbell* v. *Harding* (*f*); and the same words, even in the same will, may have a different sense, according as they refer to *realty* or *personalty*, *Forth* v. *Chapman* (*g*). The reason for this distinction is, that *freehold* property is entailable, but *personal* property is not; but even in some cases where property might be entailed, these words have been held not to import an indefinite failure of issue, *Doe*, d. *Smith* v. *Wedder* (*h*), Lord *Glenorchy* v. *Bosville* (*i*), *Doe*, dem. *Chattaway* v. *Smith* (*j*); such therefore being the reason of the rule, it applies equally to the property in question, which is copyhold, not entailable by the custom of the manor. Formerly it was held that there could be no limitation

(*o*) Cro. Car. 42.
(*p*) 9 Mod. 483; ed. *Leach.*
(*q*) Amb. 279; S. C. 2 Ves. sen. 596, 601.
(*r*) 5 T. R. 104.
(*s*) 5 B. & A. 458.
( ) Westm. 2, 13, E. 1.
(*u*) 3 Rep. 1, a. 3, b.
(*v*) Plowd. 223, 227; see also pp. 235, 239, 241, 248, 249, 252.
(*w*) Vaughan, 360.
(*x*) 2 Ves. sen. 170, 180.
(*y*) 7 Bing. 695; S. C 1 Moo. & S. 14; 1 Mylne & K. 32.
(*z*) 2 Ves. sen. 337, 354, 5; see also Dy. 4, pl. 10, Piggott on Recoveries, 21.
(*a*) 1 P. Wms. 563.
(*b*) 2 Saund. 388.
(*c*) 1 Cowp. 410.
(*d*) 2 T. R. 720.
(*e*) 9 Ves. 197.
(*f*) 2 Russ. & Mylne, 390.
(*g*) 1 P. Wms. 663.
(*h*) 1 B. & A. 713.
(*i*) Ca. Temp. Talbot, 4.
(*j*) 5 M. & S. 126.

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over, after a devise in fee (*k*), but that rule was afterwards departed from in *Wellock* v. *Hammond* (*l*). There are no words in this case sufficient to create a conditional fee, and the words of limitation cannot be rejected.

Sir *W. Follett*, in reply.—It is contended, that the words in question cannot operate as a remainder after a conditional fee; they cannot operate as an executory devise over, for it would be too remote; they must therefore import an indefinite failure of issue, and the lessors of the plaintiff are entitled to recover. The authorities are conclusive that such would be the interpretation of the words, if this were a case of *freehold*; but it is said, that this rule does not apply to a case of *copyhold* where there is no custom to entail; but no authority has been cited for that position. It is attempted to assimilate this to a bequest of *personal* property; but if it were, then Dr. *J. S.* would take the *absolute interest* therein, so that the construction contended for by the plaintiff would not apply. The intention of the testator will undoubtedly always be favoured; but however manifest, it never can be carried into effect, contrary to the established rules of law, *Campbell* v. *Harding*. The reason which has been given for the distinction between *real* and *personal* property, is not the correct one; the true reason is given by the Lord Chancellor, in *Forth* v. *Chapman*, *viz.*, "the reason why a devise of a freehold to one for life, and if he die without issue, then to another, is determined to be an estate-tail, is in favour of the issue (*m*), that such may have it, and the intent take place; but there is the plainest difference betwixt a devise of a freehold, and a devise of a term for a years; for in the devise of the latter to one, and if he die without issue, then to another; the words (if he die without issue) *cannot be supposed to have been inserted in favour of such issue*, since they cannot by any construction have it (*n*)." Although this distinction is now finally settled, *Daintry* v. *Daintry* (*o*), *Cooke* v. *De Vandes* (*p*), yet it has not escaped animadversion (*q*), and the Court will not now extend and diversify that distinction.

The Court took time to consider; and the judgment was now delivered by

TINDAL, C. J.—The claims of the respective parties, opposed to each other in this ejectment, will be found to depend upon the question, what estate was taken by Dr. *John Simpson*, under the will of his father, set out in the special case. On the part of the lessors of the plaintiff, it is insisted, that he took an estate in the nature of a *conditional fee* at common law, and that the devise over to the five illegitimate children of the testator was void either as a remainder or an executory devise; as a remainder, inasmuch as no remainder can be limited upon, or after a conditional fee; and void as an executory devise, inasmuch as it was limited after a general failure of issue of the first taker, and is therefore too remote. On the part of the defendants, it is contended, that Dr. *John Simpson* took an estate in fee with an executory devise over to the testator's five children, in the event of his dying without leaving issue at the time of his death, and that such executory devise took

(*k*) Dy. 33, pl. 12.
(*l*) Cro. El. 204.
(*m*) See also *Target* v. *Gaunt*, 1 P. Wms. 432.
(*n*) 1 P. Wms. 667.
(*o*) 6 T. R. 307.
(*p*) 9 Ves. 197, 203.
(*q*) See *per* Lord *Thurlow*, C., in *Biggs* v. *Bensley*, 1 Bro. C. C. 170, *per* Lord *Kenyon*, C. J., in *Porter* v. *Bradley*, 3 T. R. 146.

effect upon his death without issue. We are of opinion, that upon the proper construction of this will, with reference to the subject matter of the devise, Dr. *John Simpson*, the devisee, took a conditional fee, and that the limitation over to the five children was void, either as a remainder or an executory devise. The devise to Dr. *John Simpson*, as it occurs in the first part of the will, is in these terms, "To him, his heirs, and assigns, for ever, but if it shall happen, that he shall die without leaving any child or children," then over to the five illegitimate children of the testator. But whatever might have been the construction of this devise, if nothing more had been expressed upon it in the will, we think the testator has in a subsequent part of the will expressly declared his own meaning of the devise to be, if the first taker should die "without issue." Now it is unnecessary to cite authorities to shew that under such a devise, if the subject matter had been land of *freehold* tenure, the devisee, Dr. *John Simpson*, would have taken an *estate tail* therein, and the devise over would have been good as a remainder. But as the land in question is copyhold, and as it is well established, that copyhold land is not within the Statute *de donis*, and therefore not capable of being entailed, unless there is a custom in the manor of which it is holden to create estates tail therein; and as it is expressly found in the special case, that no such custom exists in either of the manors whereof the copyhold lands in question are respectively parcel; it follows necessarily that the devisee could not take an *estate tail* under these words, but that he could only, as we think he did in fact, take that estate which such words would have created before the Statute *de donis* was passed, that is *a fee-simple conditional at common law*. And it is the necessary consequence of holding the devisee to have taken such estate, that no remainder over can be limited or grafted upon it, there being nothing left of the original fee-simple, but a bare possibility of *reverter* to the donor. And this brings us to the main and principle contention on the part of the defendants, namely, that even admitting the estate taken by Dr. *J. Simpson* to be a conditional fee at common law, and that the limitation over to the five children cannot be good by way of remainder, yet that such limitation may be good by way of executory devise. The argument on this point on the part of the defendants appears to stand thus: that a limitation after a general "dying without issue," receives a different construction according to the subject matter of devise; that if the devise be of *real estate*, the words above mentioned are construed to mean a general failure of issue, and thereby give the first taker an estate tail, and the devise over becomes good as a remainder; but that if the devise be of *leaseholds* or *personalty* in which no estate tail can properly exist, the same words are construed to mean a "dying without issue, living at the death of the first taker." And it is observed, that this distinction is so well established, that Lord Chancellor *Macclesfield*, in the case of *Forth* v. *Chapman*, interprets these very same words, in the same will in a different sense, according as they were applied to *real estate* or *personalty*. It is urged, therefore, that as the first taker cannot take an estate tail in the premises devised by reason of the tenure of the property, so that the limitation over cannot be good by way of remainder; so in order to effectuate the manifest intention of the testator, the failure of issue must be restricted "to the dying without issue, living at the death of the first taker," so as to make the limitation over good, by way of executory devise. But admitting the position laid down by the defendants to be just, when applied to the case of *leasehold* or *personalty*, we

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can see no reason for holding it applicable to the case now before us. In the first place, the subject matter of the devise in the present case *is* real estate, *not* personalty. If therefore, the rule of construction depends upon the nature of the property devised, being real or personal estate, the same construction must be allowed to apply in this case, which must be admitted to be the proper construction, with respect to the devise of property of freehold tenure, in the same terms. But it appears to us in the next place, that the true principle of the distinction above adverted to is this, that in the case of property descendible to heirs, the words of the devise, by restricting the general sense of the word "heirs," amount to the limitation of an estate, "to the devisee and the heirs of his body;" which limitation, in cases where the Statute *de donis* does not apply, conveys a *fee conditional*, and when that Statute does apply, conveys an *estate tail;* that the estate so limited descends in either case to the heirs special of the first taker, subject in the former to be defeated after the birth of the issue; and, in the latter, by a common recovery—that is, subject to the consequences which necessarily belong to the nature of such estates respectively. If then, according to the established rule of construction, the words employed by the testator convey a legal estate of inheritance to the first taker, and the heirs of his body, they ought not at the same time to be so construed as to create an executory devise, and thereby restrain the right of alienation by the tenant of the fee conditional, or by the tenant in tail, as the case may be, in a manner not allowed by law. In the case of *leasehold* property given to a man and his heirs, "and if he die without leaving issue then over," the devisee can by no construction take any legal estate of inheritance, either in fee-simple, or fee-conditional, or fee-tail; for an estate of leasehold can never descend to his heirs, either general or special. Some other construction must therefore of necessity be put upon the testator's meaning, and the only question must be, whether he meant to give the estate absolutely to the first taker, or in such manner as may authorize the Court to give effect to the intention of the testator of providing for the ulterior objects of his bounty by executory devise. But in the case of real property, where the first taker is held to take in fee-tail, the primary intention of the testator is carried into effect for the estate (if not destroyed by the act of the party himself), must in the course of descent pass in succession to the different descendants of the first taker, until all the issue are extinct. And although no devise over can be limited upon the conditional fee, the intention of the testator is carried into effect so far as by law is possible. We therefore think Dr. *John Simpson* took under his father's will *a fee simple, conditional at common law*, and that upon the death of the father, the possibility of reverter in the father descended to and came upon the son, and that the fee-simple absolute, and the fee-simple conditional coming together, the fee-conditional merged therein, according to the doctrine laid down by Lord *Hardwicke*, in 2 *Vesey*, sen. 354 (*r*); and the consequence necessarily follows, that being seized of the fee-simple, it passed by his will to the lessors of the plaintiff, in the proportions in which it stands devised to them; and that the verdict should therefore be entered for the plaintiff, in the proportion of two-thirds on the demise of *John Simpson*, and one-third on the demise of *Mary Rothery*.

Judgment for the plaintiff accordingly.

(*r*) In *The Bishop of Sodor and Man* v. *The Earl of Derby*.

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A *CAPIAS* having issued against the defendant on the 26th *April*, for 200*l.*; on the same day he deposited that sum, together with 10*l.* with the sheriff's officer, pursuant to the Statute 43 *Geo.* 3, c. 46, s. 2 (*a*). The sheriff's officer, notwithstanding repeated applications to him by the defendant's attorney to pay the money into Court, did not do so till the evening of the 5th *May*, which was the last day for the defendant to put in bail. The defendant's attorney had previously applied to the officer of the Court to be allowed to pay in an extra 10*l.*, in pursuance of the 7 & 8 *G.* 4, c. 71, s. 2 (*b*); but the officer declined to receive it, till the former sums, deposited with the sheriff, had been paid in. On the 6th of *May*, the defendant's attorney again applied to pay in the extra 10*l.*, and the officer then received it. On the same day the plaintiff obtained a rule *nisi* for the payment over to him of the money paid into Court by the sheriff, which rule was, after argument, made absolute on the 8th of *May*, and the plaintiff received the money out of Court. The defendant had afterwards entered a common appearance, and ruled the plaintiff to declare, but he refused to proceed further with the action. Under these circumstances,

A *capias* having issued against the defendant for 200*l.*, he deposited that sum and 10*l.* in the hands of the sheriff, under the 43 *G.* 3, c. 46, s. 2. He afterwards offered to pay into Court an additional 10*l.*, under the 7 & 8 *G.* 4, c. 71, s. 2; but the officer refused to receive it till the former sums were paid in; by the fault of the sheriff's officer they were not so paid in till the evening of the last day upon which bail could be put in. On the day following the defendant paid in the additional 10*l.*; and on the same day the plaintiff obtained a rule *nisi* for payment over to him of the sums paid in by the sheriff; which was afterwards made absolute:—*Held*, that the defendant was not entitled to have back the sums which had been paid over to the plaintiff, and that the payment of the second sum, could not, under the circumstances, be considered as equivalent to putting in and perfecting special bail.

Petersdorff, in last *Michaelmas Term*, having also an affidavit of merits, obtained a rule, calling upon the plaintiff to shew cause why the sums of 200*l.* and 10*l.* paid into Court by the sheriff, and 10*l.* paid into Court by the defendant, should not be re-delivered to the defendant upon his putting in and perfecting special bail; or why such payment into Court should not be deemed equivalent to the defendant's having put in and perfected bail in due time, against which,

Wilde, Serjt., and *Knowles* shewed cause.—The Court have in fact already

(*a*) By which it is enacted "that all persons arrested upon *mesne* process shall be allowed, in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff the sum indorsed upon the writ, together with 10*l.* to answer the costs, and shall thereupon be discharged from such arrest; and the sheriff shall, at or before the return of the writ, pay into Court the money so deposited; and in case the defendant shall duly put in and perfect bail, the money deposited and paid into Court shall, by order of Court, be repaid to such defendant; but *in case the defendant shall not duly put in and perfect bail*, then the money deposited and paid into Court shall, by order of Court, be *paid over* to the plaintiff, who shall be thereupon authorized to enter a common appearance, &c."

(*b*) By which, after a recital of the 43 *G.* 3, c. 46, s. 2, it is enacted "that in all cases in which any defendant shall have been discharged from arrest upon making such deposit, *and the sum so deposited shall have been paid into Court*, it shall be lawful for defendant, instead of putting in and perfecting special bail, to allow the sum so deposited and paid into Court, together with the additional sum of 10*l.* to be paid into Court by defendant as a further security for the costs, to remain in the Court to abide the event of the suit, &c."

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decided upon this case, when the rule was made absolute for paying over to the plaintiff the money deposited to the sheriff. If the latter has been guilty of any *laches* in not having paid in the money sooner, the defendant has a remedy over against him; but he is clearly much too late in his present application; nor is this a state of circumstances contemplated by the Statutes in question: the 43 *G.* 3, directs, that if the defendant "shall not duly put in and perfect bail, then the money deposited and paid into Court shall be *paid over* to the plaintiff;" it does not say that it is to be paid in the nature of a deposit. Here, the defendant having failed to put in bail in due time, the payment into Court of the second 10*l.*, under the 7 & 8 *G.* 4, was too late: if, after such failure, he had applied, he would not have been allowed to take out of Court the money paid in by the sheriff, *Geach* v. *Coppin* (*c*). *Stratford* v. *Love* (*d*) may be relied on by the other side, but that case only shews that the defendant was not bound to pay in the second 10*l.* till the last day for *perfecting* special bail, and the bail there had been put in in time; and *Rowe* v. *Softly* (*e*), and *Stanforth* v. *M'Cann* (*f*) are to the same effect.

Bompas, Serjt., and *Petersdorff*, in support of the rule, contended that the defendant ought not to be precluded by the misconduct of the sheriff's officer, who was rather the plaintiff's agent than the defendant's; that when the money was taken out by the plaintiff it was in the nature of a *deposit* or *security*, and not as *payment*; that the deposit of the second 10*l.* was made under the 7 & 8 *G.* 4, "*instead of putting in and perfecting special bail*," and was equivalent to a *render*, in which case the defendant would have been entitled to have had his money repaid him, *Harford* v. *Harris* (*g*), *Chadwick* v. *Battye* (*h*), *Gould* v. *Berry* (*i*), *Douglass* v. *Stanbrough* (*j*). When the second 10*l.* was paid in, the whole sum ought to have remained in Court till judgment obtained or some other legal termination of the suit, *Johnson* v. *Wall* (*k*), *Bull* v. *Turner* (*l*). The plaintiff therefore, ought at any rate to proceed with the action.

The Court took time to consider, and judgment was now delivered by

TINDAL, C. J.—His lordship, after going over the facts of the case, said, It has been insisted, that the plaintiff ought not to have been allowed to take the money out of Court after the additional 10*l.* for costs had been paid in; and that at all events, as the defendant was not to blame, and an affidavit of merits is now produced, the plaintiff ought not to be allowed to retain the money without proceeding in the action. But we are of opinion, upon full consideration, that the defendant is not entitled to the relief which he seeks, and that this rule must be discharged. The time for putting in bail expired on the 5th *May*, and no bail was then put in; the plaintiff therefore was, by the terms of the Statute of the 43 *G.* 3, c. 46, s. 2, entitled to have the sum deposited paid over to him. If indeed bail had been *put in* within due time,

(*c*) 3 D. P. C. 74.
(*d*) 3 D. P. C. 593; S. C. 1 Har. & Wol. 195.
(*e*) 6 Bing. 634; S. C. 4 M. & P. 464.
(*f*) 4 D. P. C. 367; S. C. (*nom. Stanford* v. *M'Cann*), 1 Gale, 344, (*nom Stamford* v. *M'Cann*), 2 C. M. & R. 632.
(*g*) 4 Taunt. 669.
(*h*) 3 M. & S. 283.
(*i*) 1 Chit. R. 143.
(*j*) 3 A. & E. 316.
(*k*) 4 D. P. C. 315.
(*l*) 1 M. & W. 47.

the plaintiff would not have been entitled to the money till the time for *perfecting* the bail had expired, and the defendant would have been allowed till the expiration of the time for perfecting bail to pay the additional 10*l.* under the Statute 7 & 8 *G.* 4, c. 71, s. 2. But *where no bail are put in within the proper time, the right of the plaintiff must necessarily attach as soon as the time for that act has passed,* since no time for duly perfecting bail can be predicated of bail which have never been put in. In the cases of *Rowe* v. *Softly*, *Standford* v. *M'Cann*, and *Stafford* v. *Love*, bail had been put in within the time, and the Courts held that the defendant had a right, till the time for perfecting them had expired, to take advantage of the 7 & 8 *G.* 4, c. 71, s. 2. On the other hand, in the case of *Newman* v. *Hodgson* (*m*), where money had been deposited with the sheriff and paid into Court, and bail was not put in and perfected in time, but the defendant was rendered subsequently to a rule *nisi* obtained for payment of the money over to the plaintiff, he was allowed to have the money out of Court, there being no affidavit of merits. In this case, the Court say that it is analagous to an application to stay proceedings on the bail-bond, where bail are not perfected in time, in which case an affidavit of merits is required. It has been settled, that if bail above be not put in within the eight days mentioned in the writ, the plaintiff is entitled to an assignment of the bail-bond, and to proceed on it immediately, *Hillary* v. *Rowles* (*n*); see also *Geach* v. *Coppin*. In this case, if upon shewing cause against the former rule, an affidavit of merits had been then produced, the Court (as the second 10*l.* had then been paid in, though too late) might possibly have refused to make the rule absolute. But after the plaintiff, who is not in fault, has actually received the money under the authority of a rule of Court, regularly made, in consequence of a default on the part of the defendant, we think the Court ought not to interfere.

Rule discharged (*o*).

(*m*) 2 B. & Ad. 422; S. C. 1 D. P. C. 329.
(*n*) 2 D. P. C. 201; S. C. 5 B. & Ad. 460.
(*o*) See *Young* v. *Maltby*, 1 Har. & Wol. 214.

Ex parte WARE.

Jan. 31.

Where an attorney has altered his name by royal licence, the Court will not order the master to alter his name on the roll accordingly.

WALKER applied for leave that the Master might alter the name of an attorney upon the roll, to that of *Ware*, he having lately taken such name by royal licence: he had been admitted in 1824. He stated that a similar application had been acceded to in the *Queen's Bench*.

TINDAL, C. J.—I do not see how it can be done; it would be a sort of anachronism to alter this gentleman's name on the roll of 1824, when he was admitted, to another name which he did not then possess. He can take out a certificate in his new name, if he pleases.

Refused (*a*).

(*a*) As to changing surnames, see *Barlow* v. *Bateman*, 3 P. Wms. 65; *Doe*, dem. *Luscombe* v. *Yates*, 5 B. & A. 544; *Leigh* v. *Leigh*, 15 Ves. 100, 111. See also 3 Br. P. C. 272; *Davies*, dem. *Lowndes*, sen., 2 Scott, 71, 103; 1 Bing. N. C. 597.

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WHIFFLE *v.* BRADFORD.

Jan. 31.

The judge having left the Court after the jury had retired, upon their return they tendered to the associate a verdict in writing for the plaintiff, containing their reasons; the associate refused to receive it, and entered the verdict generally for the plaintiff:—*Held*, he was justified in so doing.

TROVER for a tea-service. The cause was tried before *Coltman*, J., at the Sittings during Term. The defence was, that the tea-things were a gift. The jury retired, and were out for three hours; when they returned, the judge having left the Court, they handed to the associate a written paper, containing a verdict for the plaintiff; the associate refused to receive it, and the verdict was entered generally for the plaintiff.

J. Jervis, applied for a rule *nisi* to set aside this verdict, and have a new trial, on the ground that the associate had no right to refuse the written verdict.—It appeared that the writing contained certain reasons why the verdict was to be for the plaintiff, viz., that the jury thought the defendant under the circumstances, ought to return the goods, whether they were a loan or a gift.—[*Tindal*, J.—It is something like the verdict of "not guilty, on condition the prisoner leaves the town before night."]—The paper might have contained facts, in which case it would have been a special verdict; if the jury find a special verdict, and the judge were to send them back, and tell them they must find generally, it would be a misdirection.—[*Park*, J.—I never heard before of a misdirection by an associate.]—He was for the time *in loco judicis*, and ought to have taken the verdict as the jury tendered it to him.

TINDAL, C. J.—I think the officer was perfectly justified in what he did. It appears that the paper contained certain reasons or conditions stated by the jury; it was nothing like a special verdict.

Rule refused.

Jan. 31.

GATLIFFE *v.* BOURNE and others.

There is no general rule of law which governs the delivery of goods by ship-owners, under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of the delivery.

SPECIAL assumpsit.—The first count stated, that the plaintiff on the 22d of *August*, 1836, at the defendants' request, caused to be delivered to them divers goods and merchandize to be taken care of, and safely and

In *assumpsit*, the first count was upon a special contract to carry goods in a steam-vessel from *Dublin* to *London*, and to deliver them at the port of *London* to the plaintiff; *breach*, that by the defendants' negligence the goods were lost. *Pleas*:—*First*, that after the arrival of the steam-vessel in *London*, the defendants landed the goods at a certain wharf, (being a usual place for such purpose), where they were destroyed by an accidental fire. *Second*, that after the arrival of the steam vessels, the defendants were ready to deliver to the plaintiff, but that he was not ready to receive, concluding with an allegation of the landing on the wharf and loss by fire, as in the former plea:—*Held*, bad in substance, as containing no excuse for the non-delivery; no special custom of the port of *London* being alleged that such landing amounted to a delivery.

The second count was upon a contract to carry goods from *D.* to *L.*, and to take care of them at a wharf there, and deliver them to the plaintiff. *Plea*, that the defendants did take care of them, at the wharf, till they were destroyed by fire; *held* bad, as the defendants were charged as common carriers.

The plaintiff having demurred to the defendant's pleas, the latter omitted to give notice of the points intended to be insisted upon by him, as required by *R. T.* 11 *G.* 4. The Court confined him to answering the argument of the plaintiff.

securely carried and conveyed by them in and by a certain steam-vessel of the defendants, called, &c.; from certain parts beyond the seas, to wit, from *Belfast* to *Dublin*, and there to wit, at *Dublin* to be re-shipped into a certain other steam-vessel of the defendants, called, &c., and to be by the defendants carried and conveyed in and by the said last mentioned steam-vessel, from *Dublin* aforesaid, to *London*, and there, to wit, at the port of *London* aforesaid, to be delivered in the like good order and condition, (all and every the dangers and accidents of the seas and steam navigation, of what nature and kind soever excepted) unto the plaintiff, or his assigns, on paying for the said goods certain freight and charges, with primage and average acccustomed, and thereupon in consideration of the premises, and of the said freight and reward, the defendants then promised the plaintiff *to take care of*, and safely and securely *carry and convey and deliver the said goods* and merchandize as aforesaid, (all and every the dangers and accidents of the seas and steam navigation, of what nature or kind soever excepted.) But although the defendants then took, accepted, and received the said goods and merchandize of and from the plaintiff, for the purpose aforesaid, and although the said last mentioned steam-vessel, called, &c., afterwards to wit, on, &c., safely arrived at *London* aforesaid, with the said goods and merchandize on board thereof, and although none of the said dangers and accidents so excepted as aforesaid, prevented the safe carriage and delivery of the said goods and merchandize, or of any part thereof, and although a reasonable time for the delivery of the said goods and merchandize had long since, and before the commencement of this suit, elapsed, and although the plaintiff was always ready and willing to pay the defendants the said freight and charges aforesaid, with such primage and average as aforesaid, of all which said several premises, the defendants to wit, on, &c., had notice, and were then requested by the plaintiff to deliver to him the said goods and merchandize, and although the defendants in part performance of their said promise, delivered to the plaintiff at *London* aforesaid, a part of the said goods, to wit, one box of linen, yet the defendants did not nor would at any time deliver the residue of the said goods and merchandize, or any part thereof to the plaintiff, but had hitherto wholly neglected so to do; and the defendants so carelessly, negligently, and improperly conducted themselves with respect to the residue of the said goods and merchandize, whilst they were in their custody, for the purposes aforesaid, that for want of due care in the defendants and their servants in that behalf, the said residue of the said goods and merchandize afterwards to wit, on, &c., became, and was wholly lost to the plaintiff, and by reason of the premises, the plaintiff wholly lost and was deprived of divers great gains and profits to a large amount, to wit, &c., which otherwise would have arisen and accrued to him by the sale of the said residue of the said goods and merchandize.

The second count alleged, that the plaintiff employed the defendants to take care of the said goods and merchandize at the wharf, when they should be landed, at the port of *London*, and carry and convey the same from such wharf to a certain place of business of the plaintiff, situate, &c., and there deliver them to the plaintiff, within a reasonable time, &c., and that the defendants promised the plaintiff to take care of and carry and convey the same from such wharf to the place of business of the plaintiff, and there deliver them within a reasonable time, &c. *Breach*, non-delivery.

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Third Plea to the first count; that the said steam-vessel therein last mentioned, was and is a vessel used and employed by the defendants, for the conveyance of goods and merchandize for freight from parts beyond the seas, to wit, from the port of *Dublin* to the port of *London*, and that the said goods and merchandize in that count mentioned, were shipped and received on board of the said steam-vessel, at *Dublin*, upon and under the terms and conditions expressed and contained in a certain *bill of lading*, whereby it was expressed, that the said goods and merchandize were to be delivered at the said port of *London*, in the like good order and condition, in which they were so shipped (all and every the dangers and accidents of the seas and steam navigation, of what nature or kind soever excepted) unto the plaintiff or his assigns, on paying for the said goods, freight, and charges, as mentioned in the margin thereof, with primage and average accustomed. That after the arrival of the said steam-vessel, at *London* aforesaid, with the said goods and merchandize on board thereof, as in the first count mentioned, to wit, on, &c., the defendants caused the said goods and merchandize (except the part thereof in that count mentioned to have been delivered to the plaintiff) to be unshipped therefrom, and safely and securely landed and deposited in such like good order and condition as aforesaid, in and upon a certain wharf, called *Fenning's* wharf, at the said port of *London*, there to remain, until the same could be delivered to the plaintiff or his assigns, according to the tenor and effect of the said bill of lading: *the said wharf*, before that time, and then *being a place at which goods conveyed in steam-vessels from the port of* Dublin *to the port of* London, *were on their arrival at the last mentioned port, used and accustomed to be landed and deposited for the use of the consignees thereof, and* a place *fit and proper for such purposes.* That afterwards and whilst the said goods and merchandize (except as aforesaid) remained and were deposited upon the said wharf for the purposes aforesaid, and before a reasonable time for the delivery thereof, according to the tenor and effect of the said bill of lading, had elapsed, to wit, on, &c., the same goods and merchandize (except as aforesaid) were, together with divers other goods and merchandize, then being upon the said wharf for the like purposes, wholly consumed and destroyed by a fire which then happened and broke out by accident, by means whereof and from no other cause, and without any carelessness, negligence, or improper conduct, or want of due care in the defendants or their servants in that behalf, the defendants were hindered and prevented from delivering the said goods and merchandize, except as aforesaid, to the plaintiff.

Fourth Plea to the *first* count; that after the said last mentioned steam-vessel had safely arrived in the port of *London*, with the goods and merchandize on board thereof, as in that count mentioned, to wit, on, &c., the defendants were there *ready and willing to deliver* the same to the plaintiff or his assigns, according to their said promise; but neither the plaintiff or his assigns was or were there ready to receive the same, whereupon the defendants caused the said goods and merchandize (except the part thereof in the first count mentioned to have been delivered to the plaintiff) to be unshipped, and safely and securely landed and deposited in the same good order and condition, in which they were delivered to the defendants, in and upon a certain wharf, called *Fenning's* wharf, within and at the said port of *London*, there to remain until the plaintiff or his assigns should come and receive the same, or until

the same could be conveyed and delivered to the plaintiff or his assigns, the said wharf before that time, and then being *a place* at which goods conveyed in steam-vessels from the port of *Dublin* to the port of *London*, were, on their arrival at the last mentioned port, used and accustomed to be landed and deposited, and a place fit, proper, and convenient for that purpose. That afterwards, and whilst the goods and merchandize, except as aforesaid, remained and were deposited upon the said wharf, for the purposes aforesaid, and before the plaintiff or his assigns came or sent for the same, and before the defendants were requested to deliver the same to the plaintiff or his assigns, or a reasonable time for conveying them from the said wharf to the plaintiff or his assigns had elapsed, and before the same could be removed therefrom, to wit, on, &c., the said goods and merchandize, and every part thereof, except as aforesaid, were and was, together with divers other goods then being upon the said wharf for the like purposes, casually consumed and destroyed by a fire, which then and there happened and broke out by accident, and without any negligence, improper conduct, or want of due care in the defendants or their servants, and by means thereof, and from no other cause, the defendants were hindered and prevented from delivering the said goods and merchandize, except as aforesaid, to the plaintiff or his assigns.

Sixth Plea to the second count, (after setting out the bill of lading); that after the arrival of the said steam-vessel at *London*, with the said goods and merchandize on board thereof, and after the said goods and merchandize had been and were safely landed in and upon the said wharf, called *Fenning's* wharf, the defendants caused the same to be safely deposited and stored upon the said wharf, until they could be carried and conveyed therefrom, and delivered to the plaintiff; the said wharf before that time, and then being *a place* whereon goods conveyed in steam-vessels from *Dublin* to the port of *London*, were, on their arrival at the last mentioned port, used and accustomed to be landed and deposited for safe custody, until they could be conveyed therefrom, and delivered to the consignees thereof, and a place fit and proper for such purposes. And the defendants further said, that they did take care of the said goods and merchandize whilst they remained, and were stored and deposited upon the said wharf for the purpose last aforesaid, from the time of the landing thereof, until afterwards; and whilst they continued so stored and deposited, and before they could be conveyed from the wharf, and before a reasonable time for their being so conveyed, or for the delivery thereof to the plaintiff had elapsed, to wit, on, &c., the same goods and merchandize and every part thereof, were, together with other goods and merchandize, then being upon the said wharf for the like purposes, wholly consumed and destroyed by a fire, which then happened and broke out by accident; by means whereof, and from no other cause, and without any carelessness, negligence, or improper conduct, or want of due care in the defendants, the defendants were hindered and prevented from delivering the said goods and merchandize to the plaintiff.

Special Demurrer and *joinder*. [The grounds of the special demurrer, and the arguments upon the informality of these pleas, are omitted, as the Court gave judgment only on matters of substance.]

The case came on for argument in last *Michaelmas Term*, when *Stephen*, Serjt., objected, on the part of the plaintiff, that no notice had been given

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by the defendant, of the points intended to be insisted upon by him, as required by *R. T.* 11 *G.* 4, and he cited *Grottick* v. *Phillips* (*a*).

TINDAL, C. J.—The defendant will have to confine himself to answer the arguments of the plaintiff.

Stephen, Serjt., in support of the demurrer.—The pleas set up no defence to the action. The defendants are charged upon a contract to carry and deliver certain goods to the plaintiff; the reason they give for the non-delivery (viz., that they deposited the goods on a certain wharf, where they were accidentally consumed by fire) is no excuse for the breach of their contract. As carriers, it would be their duty, at common law, to deliver the goods safely, or at least to give notice of their arrival; and they would only be excused from doing so, by injury occasioned by the act of God or the King's enemies, *Forward* v. *Pittard* (*b*), *Golden* v. *Manning* (*c*), *Stephenson* v. *Hart* (*d*). That doctrine applies with stronger force here, where the defendants have expressly contracted to deliver to the plaintiff, *Dale* v. *Hall* (*e*). It was not, therefore, sufficient for them merely to deliver at a wharf, though they may have been in the habit of leaving goods there, *Wardell* v. *Mourillyan* (*f*). Whether there has been a delivery or not, is a question for the jury, *Wardell* v. *Mourillyan*; *Stephenson* v. *Hart*, *Bernal* v. *Pim* (*g*). The defendants were bound to ascertain where the goods were to be delivered. In *Com. Dig.* (*h*) it is laid down, "If a condition of an obligation be *to pay money* to the obligee at a day certain, without limiting a y place, the obligor is to seek out the obligee, if he be within the realm (*i*). But if a condition be *to deliver a weighty thing*, as corn, timber, &c. the obligor, before the day, ought to enquire where the obligee will appoint the delivery (*j*)." *Garside* v. *The Trent Navigation* (*k*) will be relied on by the other side: the marginal note to that case is, "A common carrier between *A.* and *B.*, employed to carry goods from *A.* to *B.* to be forwarded to *C.*, carried them to *B.*, there put them in his warehouse, in which they were destroyed by an accidental fire before he had an opportunity of forwarding them; and held not answerable for the loss." But there the goods were to be forwarded from *B.* to *C.* by another carrier; and the reason of the decision was, that the defendant's duty as a carrier, being only *to carry to B.*, his liability was discharged on the arrival of the goods at that place. *Hyde* v. *The Trent Navigation* (*l*) will also be relied upon; but that case was expressly decided on its own particular circumstances; and although Lord *Kenyon*, C. J., delivered his opinion, that a carrier's liability ceased upon his bringing the goods to the inn or wharf where he was accustomed to unload, yet the other three judges (*Ashurst*, *Buller*, and

(*a*) 3 Mo. & S. 132; see also *Brogden* v. *Marriot*, 2 Scott, 703, 708; 1 Hod. 383; *Bayley* v. *Homan*, 3 Scott, 384; and *Darling* v. *Gurney*, 2 D. P. C. 101; 2 C. & M. 226; *Rex* v. *Woollett*, 2 C. M. & R. 256; 3 D. P. C. 694; *Lacey* v. *Umbers*, 3 D. P. C. 732; *Ross* v. *Robeson*, *Ib.* 779.

(*b*) 1 T. R. 27.

(*c*) 2 W. Bl. 916; S. C. 3 Wils. 429.

(*d*) 4 Bing. 476; S. C. 1 M. & P. 357.

(*e*) 1 Wils. 281.

(*f*) 2 Esp. 693; and see *Quiggin* v. *Duff*, 1 Gale, 420; 1 M. & W. 174.

(*g*) 1 Gale, 17.

(*h*) Tit. *Condition*, G. 9.

(*i*) Citing Lit. S. 340.

(*j*) Citing Co. Lit. 210, b.; 4 Lev. 46.

(*k*) 4 T. R. 581.

(*l*) 5 T. R. 389.

Gross) were of a different opinion, and thought that a carrier was bound to deliver goods to the consignee.

Kelly, in support of the pleas.—As to the first count; the question has been argued, as though this were an action against a common carrier, whereas it is in fact against a ship-owner, upon a special contract to carry goods from a port in *Ireland*, and deliver them at the port of *London*; this is a contract in the usual form of a common bill of lading (*m*); and although the declaration here, does not state that the contract was in fact founded upon a bill of lading, that fact appears by the pleas, and is admitted by the demurrer. Such being the nature of the contract, and the breach alleged being a non-delivery of the goods, the defendants in effect answer, that they did carry the goods, and were ready to deliver, but that the plaintiff did not appear to receive them; therefore, the defendants landed them at *Fenning's* wharf, which was a fit and proper place for that purpose, and that upon their being so landed the goods were burnt by accident; and this is a sufficient answer to the action. It has never before been contended, that a ship-owner who undertakes to convey and deliver goods at a certain port, is bound to deliver them at the residence of the consignee. The law is different with regard to carriers by land, or inland navigation; the cases cited established their liability, but they did not apply to this question. It has also been argued, that the defendants were bound to give notice to the consignee of the arrival of the vessel; but no case has been cited to establish that obligation. It is not denied that there might be instances, where by a general course of dealing, a ship-ower would be bound to deliver to the consignee himself; such instances, however, would depend on their own circumstances, and no general rule could be deduced from them; such a rule would be a great hardship upon the ship-owner, as he could not, in all cases, know where to find the consignee. The general practice with regard to goods sent under a bill of lading from one port to another, is well known; the master, when the goods are sent on board, usually signs three parts of a bill of lading, one of which the shipper sends by post or other conveyance to the consignee, one he keeps himself, and the third remains with the master. The goods are described in the bill of lading by particular marks; and the consignee, upon receipt of his part of the bill of lading, makes enquiry as to the time when the vessel is expected to arrive, and sends for his goods accordingly; and if he does not come to the ship's side to take the goods, it is the master's duty to land them at some usual and accustomed place, *Abbott on Shipping* (*n*); *Hyde* v. *The Trent Navigation*. The defendants in their pleas aver, that they have done every thing in consonance with this practice; and it can make no difference, whether the goods are shipped from the *West Indies* or from *Ireland*; the principle must be the same.—[*Tindal*, C. J.—The plea does not say that the goods were landed *at the usual and accustomed wharf*; that, according to your authorities, would have been sufficient, but that must mean that both parties knew the wharf that was intended.]—The defendants say that *Fenning's* wharf, at which goods were accustomed to be landed, and that it was a place fit and proper for such purposes; if the plaintiff meant to contend that it was an improper place to unload at, he might have taken issue upon that allegation

(*m*) See the form, Abbott on Shipping, 214-15, 5th edit. (*n*) pp. 214, 246, 249.

It might be necessary for the defendants to unload at once, in order to return by the next tide.—[*Bosanquet*, J.—The defendants do not aver that the plaintiff did not come in reasonable time; but what they say is, that before a reasonable time had elapsed the accident happened: must not the goods then be considered to be still in their custody? If they had laid them upon the beach, they would have remained under their care.—*Tindal*, C. J.—Suppose the ship were to arrive at midnight, the master could not excuse himself by tossing the goods upon the wharf, that he might have the advantage of the turn of the tide. He is bound to wait a reasonable time; the goods must be delivered in a practicable manner.—*Vaughan*, J.—In *Syeds* v. *Hay* (*o*) it was held, that if the consignee require to have the goods delivered to himself, and direct the master not to land them on a wharf at *London*, the master must obey the request.]—The defendants allege, they were willing to deliver the goods.—[*Tindal*, C. J.—But they do not say, they waited a reasonable time: the question is, ought they not to have done so?]—It is usual for a vessel, coming from *Ireland*, to report herself inwards, and as soon as she has done so, she is bound to unload (*p*). Unless therefore it is held, that the liability of the ship-owner, after he has landed the goods, remains the same as before, the present action must fail. It is expressly said by *Buller*, J., in *Hyde* v. *The Trent Navigation* (*q*), that as "a ship trading from one port to another has not the means of carrying the goods on land; according to the established course of trade, a delivery *on the usual wharf*, is such a delivery as will discharge the carrier:" and the same rule is laid down in the same case, by *Grose*, J. (*r*), and adopted in *Abbott on Shipping* (*s*). It is not denied, but that the master is under certain liabilities, as if the consignee sends a lighter for the goods, the master is answerable for them until the loading is completed, *Catley* v. *Wintringham* (*t*); but when it is, his liability ceases, and he is not bound to take care of the goods in their transit in the lighter from the ship to the wharf, *Robinson* v. *Turpin* (*u*). The proper rule appears to be, that as soon as the goods are fairly out of the ship, the contract is at an end.—[*Tindal*, C. J.—That is, when there has been a complete delivery.]—The delivery, under such circumstances, is as complete as the nature of the case will admit, the plaintiff not being on the spot to receive the goods when they arrived.

The second count is upon a promise to take care of the goods at the wharf, and convey them to the plaintiff; it is not averred that they were in the custody of the defendants as carriers; they are charged rather as wharfingers, and as such, would not be liable to an accidental loss by fire: it cannot be contended, that they were liable, as carriers, to convey to *London*; then as warehousemen, while the goods remained on the wharf; and then again, as carriers, to convey from the wharf to the consignee. In *Re Webb* (*v*), *Webb* and others being in partnership as carriers, entered into an agreement with *Shepherd* and Co., to carry goods for them from *L.* to *F.*, where they should be deposited in the warehouse of *Webb*, the resident partner, till *Shepherd* and Co. should be ready to receive them into their own. The goods, having been

(*o*) 4 T. R. 260.
(*p*) This was stated merely on the authority of counsel.
(*q*) 5 T. R. 397.
(*r*) *Ib.* p. 400.
(*s*) p. 249.
(*t*) Peake, N. P. C. 150.
(*u*) Abb. Ship. 250.
(*v*) 2 Moo. 500; S. C. 8 Taunt. 443.

forwarded, were, after they had been deposited in *Webb's* warehouse, destroyed there by fire; and it was held, that the liability of *Webb* and Co., as carriers, ceased on the arrival of the goods at *F.*; and that when they were deposited at *Webb's* warehouse, they could only be considered as warehousemen. Besides, the plaintiff here has narrowed the breach of the contract to the non-delivery of the goods, and cannot, therefore, insist upon any want of care of them while at the wharf, *Harris* v. *Mantle* (*w*)

Stephen, Serjt., in reply.—If a ship-owner might relieve himself from his liability by placing goods upon *any* wharf at *any* time, without giving notice to the consignee, it would be most mischievous to the mercantile interest. The present case is properly treated as one against a common carrier, upon the custom of the realm; and the rule as to liability, applies equally to a carrier by water, as to a carrier by land. *Dale* v. *Hall* was an action against a ship-master.—[*Tindal*, C. J.—The judges, in *Hyde* v. *The Trent Navigation*, certainly thought there was a distinction between a ship-owner and a common carrier.]—What was said on that subject was quite extra-judicial; in *Abbott on Shipping* (*x*), the opinion is cited as having been given *arguendo*; besides, the doctrine is propounded with reference to vessels coming from *foreign* parts; but this is an *Irish* vessel; and by the 4 *G.* 4, c. 72, s. 6 (*y*), the trade with *Ireland* is declared only to be a coasting trade.—[*Tindal*, C. J.—That Act was passed with reference to certain customs' duties.]—A ship from *Ireland* can no more be looked upon as a *foreign* vessel, than a ship from *Leith*. But the argument on the other side carries the doctrine even further than those dicta; for it is contended, that the liability of a ship-owner is different from that of a land carrier, by reason of the bill of lading; but except in so far as is expressly provided for by that special contract, the liability of the ship-owner remains the same. Before the 26 *G.* 3, c. 86, ship-owners would have been liable for injury to the cargo from fire, arising from *any other* cause but lightning; but now by sec. 2 of that Statute, they are not liable for any loss, by reason of *any fire* happening *on board*.—[*Tindal*, C. J.—So that if these goods had been burnt on board the ship, instead of at *Fenning's* wharf, the plaintiff could not have recovered; that seems hard upon the defendants.]—It is a statutory exemption of their common-law liability, and will not be extended further; and the preamble of the Act shews the extent of their previous liability (*z*). It is said, however, that this is an express contract under the bill of lading; but, by the terms of that contract, the defendants undertook to deliver to the plaintiff or his assigns; and the only

(*w*) 3 T. R. 307.

(*x*) p. 249, n.

(*y*) By which it is enacted, that it shall be lawful for the Lord High Treasurer, &c., by warrant to direct that the trade between *Great Britain* and *Ireland* shall be taken and deemed to be a coasting trade and after such warrant, such trade shall be a coasting trade accordingly; and all ships and vessels in which goods, &c., shall be transported, carried, and conveyed, from any port in *Great Britain* to any port in *Ireland*, or from any port in *Ireland* to any port in *Great Britain* respectively, shall be deemed, and taken, and held to be *coasting ships and vessels to all intents and purposes whatsoever*."

(*z*) "And whereas all masters and owners of vessels are by law subject to answer for or make good to any person the full value of any goods by such person shipped on board any vessel, notwithstanding such goods be lost by robbery, *fire*, or other accident, (other than by the King's enemies, the perils of the seas, or the act of God)," &c.

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excuses mentioned in the contract, are the dangers of the seas and steam-navigation. The plaintiff does not contend that the defendants were bound to send the goods to his warehouse, but that they were bound to give him notice of their arrival.—[*Coltman*, J.—Do you admit that landing at the wharf, and notice to the consignee, would have discharged the ship-owner? —*Vaughan*, J.—And that the latter has the option either to send the goods to the consignee, or to give notice of their arrival?]—For the purpose of this argument, it may be so admitted; they were bound to do one or the other; but it is submitted, the proper course would have been to have given notice of the arrival of the ship; and if the consignee did not attend to receive the goods, then the owner might have landed them.—[*Tindal*, C. J.—That introduces the question, whether the ship-owner waited a reasonable time (which would have been for the jury); and that, perhaps, is the strong point for the plaintiff.]

As to the argument *ab inconvenienti*, of the difficulty of finding out the consignee, it may be met by a similar argument as to the difficulty of ascertaining the time of the arrival of the ship; and that would clearly be a greater difficulty than the other, for the consignee's name is always mentioned in the bill of lading; and by the Customs' Regulations Act (*a*), the master of every coasting-ship is bound to keep a cargo-book, in which is to be entered an account of all goods taken on board, and the name of the respective shippers and consignees; and the address of the consignees, if it were not otherwise known, might be learnt by the directory. If the present defence is available, a water carrier might always land at a wharf, and then compel the consignee to pay the wharfage dues.

The other side were bound to establish; *First*, that the master had a right to land the goods; and *Secondly*, that after they were landed, they were at the risk of the consignee; but they have failed in making out either of the propositions. The goods continued in the possession of the defendants, as carriers, up to the time of their delivery.—[*Vaughan*, J.—In *Maving* v. *Todd* (*b*), Lord *Ellenborough* held that the liability of a wharfinger, whilst he has possession of the goods, was similar to that of a carrier (*c*).]

Cur. adv. vult.

Judgment was now delivered by

TINDAL, C. J.—The questions upon this record, arise upon two pleas to the first, and one to the second count of the declaration. The first count is framed in *assumpsit*, upon a contract by the defendants, safely and securely to carry and convey by a certain steam-vessel, certain goods of the plaintiff, from *Belfast* to *Dublin*, and from thence to the port of *London*, "and to deliver the same at the port of *London* to the plaintiff or his assigns;" the breach assigned in the declaration being, that the defendants so carelessly and negligently conducted themselves about the carrying and conveying of the goods, that they became wholly lost to the plaintiff. The defendants in their *third* plea to this count allege, that after the arrival of the steam-vessel in *London*,

(*a*) 3 & 4 *W.* 4, c. 52, s. 112.
(*b*) 1 Star. N. P. C. 72.
(*c*) *i. e.* while he has possession of them *for the purpose of conveying them*; for the question in the case was, whether the defendants, who were wharfingers, and whose duty it was *to convey the goods* from their wharf in their own lighters to a vessel in the river, were liable for a loss by fire at the wharf."

they caused the goods to be unshipped, and deposited in a certain wharf called *Fenning's* wharf, at the port of *London*, there to remain until they could be delivered to the plaintiff; the said wharf being *a place* where goods conveyed in steam-vessels from *Dublin* to the port of *London*, were *accustomed* to be deposited for the use of the consignees thereof, and a fit and proper place for such purposes. And the defendants in their *fourth* plea to the same count allege, that after the arrival of the steam-vessel in the port of *London*, they were ready and willing to deliver the goods to the plaintiff or his assigns, but neither the plaintiff or his assigns were ready to receive the same, whereupon the defendants caused them to be unshipped, and safely landed and deposited on a certain wharf, called *Fenning's* wharf (as in the former plea); each of the said pleas concluding with the statement of the destruction of the goods by a fire, which broke out by accident, and without any negligence on the part of the defendants, after the goods had been so deposited at *Fenning's* wharf. To each of these pleas, the plaintiff has demurred specially; but as we think the pleas bad in substance, it becomes unnecessary to give any opinion on the objections, which have been assigned as causes of special demurrer, in point of form. The defendants, in each of the pleas, profess to substitute a delivery at *Fenning's* wharf, in the port of *London*, for and in the place of a delivery "at the port of *London* to the plaintiff or his assigns," as required by the terms of the bill of lading, and call upon us to say, by our judgment, that such delivery, under the circumstances stated in each plea, is a good delivery, in point of law, under the bill of lading. But *we know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery.* An issue raised upon an allegation of such a mode of delivery would accommodate itself to the facts of each particular case, and would let in every species of excuse from the strict and literal compliance with the precise terms of the bill of lading, which must necessarily be allowed to prevail with reference to the means and accommodation for landing goods at different places, the time of the arrival and departure of the vessel, the state of the tide and wind, interruptions from accidental causes, and all the other circumstances which belong to each particular port or place of delivery. The delivery, therefore, of these goods not being alleged in the pleas to have been made according to the custom or practice of the port of *London*, we cannot take notice that it is sanctioned by such practice, and the delivery must, therefore, stand or fall upon the allegations contained in each plea. Now as to the first of these special pleas, it contains no other allegations therein, than that after the arrival of the steam-vessel, the defendants caused the goods to be unshipped therefrom, and securely landed and deposited in and upon *Fenning's* wharf, until they could be delivered to the plaintiff, the wharf being one at which goods, brought in steam-vessels from *Dublin* to *London*, were used to be landed and deposited for the use of consignees, and a place fit for the purpose. But at what interval, after the arrival of the steam-vessel, they caused the goods to be landed and deposited, does not appear. Whether a reasonable time was allowed to elapse after the ship's arrival in the port of *London*, in order to give time to the plaintiff to claim and receive his goods from alongside the vessel, the plea is altogether silent. It is even quite consistent with the allegations in this

plea that the plaintiff demanded the delivery of his goods before they were landed, and that the defendants refused or neglected to permit him to receive them. And we hold this plea bad, if for no other reason, at all events for this, that it leaves the matter in uncertainty whether the plaintiff was not compelled, against his will, to receive his goods from a wharf, where there is no allegation that such is the usual practice observed in the port of delivery. The next special plea contains indeed the additional averment, that after the steam-vessel had arrived in the port of *London*, the defendants were ready and willing to deliver the goods to the plaintiff or his assigns, but that they were not there ready to receive them, whereupon the defendants landed the goods at the wharf before described. But this allegation is open to the very same objection as was taken to the former plea, namely, that it does not appear that the plaintiff had a reasonable time or opportunity for receiving his goods from the vessel's side. The statement in this plea is compatible with the supposition that the steam-vessel arrived in the port at midnight, and proceeded in full speed to the wharf, and there immediately deposited the goods; facts, which, whatever might be the readiness or willingness of the defendants to deliver, would make it impracticable for the plaintiff to receive them if he had been there, and unreasonable to expect either the plaintiff, or the assignee of the bill of lading to be there; and if such a mode of delivery is to be held good, it can only be by reference to the usage and custom of the port of *London*, as to which, the plea is altogether silent. We therefore think neither of these pleas affords an answer to the first count of the declaration.

As to the second count of the declaration, we think it is framed upon a special undertaking by the defendants, charging them, as common carriers, until the actual delivery of the goods at the place of business of the plaintiff. For, after stating the contract to carry the goods from *Belfast* to *Dublin*, and thence to *London*, and there, to wit, at the port of *London*, to deliver the same to the plaintiff or his assigns, on payment of certain freight, it proceeds to allege, that in *consideration of the premises*, and that the plaintiff, at the request of the defendants, employed them to take care of the said goods at the wharf where they should be landed from the steam-vessel, at the port of *London*, and to carry and convey the same from such wharf to a place of business of the plaintiff in *Ironmonger-lane*, and to deliver the same to the plaintiff in a reasonable time for *other reward* to the defendants, they, the defendants, undertake and promise accordingly. And we cannot see any ground for supposing the defendants to be clothed with one degree of responsibility, whilst taking care of the goods at the wharf, and another, and different degree, whilst carrying the goods from the wharf; inasmuch, as both these duties form part of the same express contract, and are paid for by the same reward; but on the contrary, we think they are acting during the whole of the time, whilst the goods are in their possession, under the obligation of a common carrier; and if so, it is obvious the plea furnishes no answer to the loss of the goods by fire at the wharf; a carrier, according to the well known rule of law, being liable for every loss (not specially excepted), except those occasioned by the act of God and the King's enemies. And it appears to us, that the principle laid down in the case of *Hyde* v. *The Trent Navigation Company*, bears very closely upon and governs the decision of the present case. We therefore think there must be

Judgment for the plaintiff on these pleas.

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J. JERVIS applied for a *distringas*.—It appeared that the defendant, a female, formerly resided in *Russel-square*, but she had left that place in 1833, and her present residence could not be discovered. The plaintiff had applied several times to her attorney, and also to her brothers; but they had refused to disclose her residence; the plaintiff by letter, had given notice of the issuing of process to the attorney, and had also enquired of him, whether he would appear to the action, but the attorney had paid no attention to these applications.—[*Park*, J.—By the Uniformity of Process Act (*a*), the writ is to be "directed to the sheriff of the county, wherein the *dwelling-house or place of abode of such defendant shall be situate.*"]—Here the writ would issue to the sheriff of *Middlesex*, as *Russel-square* was the last known place of abode of the defendant. The Statute of Limitations would shortly run against the plaintiff's demand.

Where a defendant's residence for the last five years was unknown, and applications had been made to her attorney and other parties to ascertain her present residence without success, the Court granted a *distringas*.

Granted.

(*a*) 2 W. 4, c. 39, sec. 3.

DOE, dem. GRAFF *v.* ROE.

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BOMPAS, Serjt., moved for judgment against the casual ejector. The ejectment was brought to recover some detached stables; and the service of the declaration had been on the wife of the tenant in possession, at his dwelling-house.

In ejectment for detached stables, service on the wife of the tenant, at his dwelling-house, is sufficient.

TINDAL, C. J.—That is sufficient; otherwise a party might never be able to recover stables.

Rule granted.

WEEKES *v.* PAUL.

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R. V. LEE, had obtained a rule *nisi*, for the examination of a witness on interrogatories, who was about to leave the country.

Delay on the part of the plaintiff is no objection to his obtaining a rule to examine, on interrogatories, a witness who is going abroad.

J. Bayley, shewed cause.—He objected, that the application was not made in proper time.—The action was commenced in *April*, 1836; in *May*, the defendant pleaded; no further steps had been taken till the following *November*, when the plaintiff gave notice of his intention to proceed to trial after *Michaelmas Term*; nothing however had been done, till the present motion was made.

The Court however did not think this a sufficient objection, and made the Rule absolute.

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By sec. 44, of 6 & 7 *W.* 4, c. cxxxvij, (the *Westminster* Court of Requests' Act,) debtors "*residing* or *inhabiting*," or "*keeping any counting-house*, &c." may be summoned before the commissioners, &c.; by sec. 86, "no action for any sum not exceeding 40*s.*, and recoverable in the Court of Requests, shall be brought against any person *residing* or *inhabiting* within the jurisdiction thereof." The Act gives no remedy to the defendant for his costs.

Held, first, that the Court could not give a defendant his costs though the plaintiff had only recovered 10*s.*

Secondly, that a defendant *keeping a counting-house* within the jurisdiction, could not avail himself of the 86th section.

WHITE *v.* SEFFERT.

FISHE, on a former day in this Term, had applied for a rule *nisi*, to enter a suggestion on the roll to deprive the plaintiff of his costs, under the *Westminster* Court of Requests' Act, 6 & 7 *W.* 4, c. cxxxvij, (*a*), by which the former Act (23 *G.* 2, c. 27) was repealed; the plaintiff in the present instance, having only recovered 10*s.*, and the defendant stating that he was liable to be summoned to the Court of Requests. The former Act contained a provision, that in any action for debt under 40*s.*, brought in the superior Courts, the defendant might plead that at the time of the commencement of the suit he was inhabitant within the jurisdiction, &c., and in case of his succeeding upon such plea, the defendant was to have his full costs (*b*), but there was no such provision in the new Act.

TINDAL, C. J.—The new Act may have furnished the defendant with grounds to nonsuit the plaintiff, but as it contains no provision as to costs, we cannot give them.

Fishe then applied for, and obtained a rule *nisi*, to set aside the proceedings, with the costs of his application.

Wilde, Serjt., shewed cause.—It appeared, that the defendant's affidavit only stated, that he *kept a counting-house* within the jurisdiction; which the learned serjeant contended did not bring him within the 86th section: the power to summon under the 44th sec., was different from the prohibition against suing contained in the 86th.

Kelly and *Fishe*, in support of the rule, argued, that the two sections must be taken together; and that the words "residing and inhabitant," in the 86th section, included all the modes of residence mentioned in the 44th.

TINDAL, C. J.—There may possibly be a ground for the difference in the two sections, and the legislature may have meant that a plaintiff *might*, at his option, sue in the Court of Requests, any party *carrying on business* within the jurisdiction, but that he *must* sue every *inhabitant*; at any rate,

(*a*) By *sec.* 37, "it shall be lawful for the commissioners to decide all disputes for any sum not exceeding 5*l.*" By *sec.* 44, "it shall be lawful for any person who shall have any debt or demand owing or due to, or claimed or demanded by, such person residing or inhabiting within the city of *Westminster*, or keeping or using any house, warehouse, counting-house, &c., or employed, working, or seeking a livelihood, or trading, or dealing within the same city, to apply to the clerk of the Court, who shall make out a summons directed to such debtor, requiring such debtor to appear before the commissioners, and the commissioners are empowered to make due enquiry concerning such demands, and pass judgment thereupon and award costs of writ." By *sec.* 86, "no action for any debt not exceeding 40*s.*, and recoverable in the said Court of Requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any other Court whatsoever. Provided always, that nothing herein contained shall destroy the jurisdiction of his majesty's Court of record at *Westminster*, in cases wherein the debts shall exceed the sum of 40*s.*"

(*b*) Sec. 8.

the defendant was bound to bring himself, by his affidavit, within the words of the 86th section; and having failed to do so, the rule must be discharged.

Rule discharged.

CANTRELL and others *v.* The GUARDIANS of the POOR of the WINDSOR UNION.

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THIS was an action of trespass, brought pursuant to an order of the Lord Chancellor, to ascertain if the defendants were entitled to take certain messuages and lands described in the declaration, for the purposes of the Statutes 4 & 5 *W.* 4, c. 76, & 5 & 6 *W.* 4, c. 69, (The Poor Law Amendment Acts).

At the trial before *Tindal*, C. J., at the *London* Sittings after *Trinity Term*, 1836, a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case:—

The premises in question are situate in the parish of *Old Windsor*.

Previous to the year 1753, four cottages had been erected in the parish of *Old Windsor*, from funds derived from various legacies and benefactions, given for the use of the poor of *Old Windsor*, amounting to 45*l.*

The above cottages were situate at the *Woodside*; and having become ruinous and incapable of being repaired, it was agreed between *Hugh Hammersley*, Esq., and the vicar, churchwardens and overseers and the parishioners of *Old Windsor*, at a vestry of the said parish, held pursuant to public notice, on the 23d *April*, 1753, that the said four cottages should be pulled down and re-built on the parish plot; that in consideration of *H. Hammersley* paying 60*l.* towards the re-building of the cottages, the parish agreed to grant him a lease of the land, on which the four cottages then stood, for ninety-nine years, renewable for ever, at 5*s.* rent yearly; pursuant to the above agreement, five cottages were erected on the parish plot out of the 60*l.*, and one other cottage was erected at the same time, out of a sum of 20*l.*, bequeathed to the parish of *Old Windsor*, by Dr. *Meredith*. Three of the above five cottages generally let at 1*l.* 10*s.* each *per annum*; the cottage erected out of the 20*l.*, at 2*l.* *per annum*; the remaining two were occupied by the paupers of the parish; and the rents of the four cottages so let, were applied at *Easter*, in gifts to the *poor house-keepers* of the parish.

The cottages having become much dilapidated in the year 1797, it was agreed, at a vestry meeting, to sell them, together with the land on which they stood, and that the purchase money should be settled by the

By the Poor Law Amendment Act, 4 & 5 *W.* 4, c. 76, sec. 23, the Poor Law Commissioners are authorized to order the overseers of any parish having a *workhouse*, to enlarge the same; by sec. 109, (the interpretation clause) the word *workhouse* is to include "any house in which the *poor* of any parish shall be lodged and maintained, or any house or building purchased, erected, hired or used at the expence of the poor-rate, by any parish, &c. for the reception, employment classification, or relief of any poor person therein, at the expence of such parish;" and the word *poor* is to include "any pauper or poor or indigent person applying for, or receiving relief from the poor-rate, or chargeable thereto."

In 1797, six cottages were erected and certain land was purchased by the parish of *W.*, partly from a fund arising from charitable bequests, and partly from a fund raised under the Inclosure Act, 29 *G.* 2, c. 36, which, in pursuance of sec. 2, was placed in the hands of the parish officers, for the relief of the poor; the cottages were repaired out of the poor-rate.

Two of the cottages were occupied, immediately after their erection, as a school-house, and afterwards as a poor-house; the other four were always let at a low rent to independent labourers, who paid no poor-rates, but some of whom received occasional relief; and on two occasions parish paupers had been lodged in these cottages; but the parish paid the tenants for their lodging.

The land was allotted into various small allotments, four of which were appropriated to the four cottages in question; the remainder being let out to independent labourers.

Held, that neither the four cottages nor the land came within the definition of "workhouses," given in the 109th sec. of the Poor Law Amendment Act.

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parish, subject to the payment of 5*l. per cent. per annum* on *Easter Monday* in every year, to be applied by the vicar, churchwardens, and overseers, for the relief of the *poor house-keepers*, paying to the church and poor of the said parish, in full compensation for the legacies by which the cottages were formerly erected. The cottages and land were accordingly sold to *Mrs. Hammersley*, for 200*l.*, under an agreement reciting the above resolutions, and which set forth that the *poor-houses* were in great decay, and that the parties, as far as they lawfully might under the 43 *Eliz.*, had agreed that the purchase money should be expended in building eight cottages, for the better lodging of the *impotent and other poor* upon the waste land, situate at *Penny Royal Pond*, to be kept in repair by the churchwardens and overseers of the said parish of *Old Windsor*, for the time being, at the expence of the parish, subject to the payment of 10*l. per annum*, on *Easter Monday*, in each and every year, clear of all deductions, by the vicar, churchwardens and overseers of the said parish, or the major part of them in the church, for the relief of the *poor house-keepers*, paying to the church and poor of the said parish, in lieu of the land and appurtenances, agreed to be conveyed to the said *Ann Hammersley* and her heirs, and the legacies and sums of money with which the same cottages were purchased or erected; the said eight new cottages to remain subject to the payment of 10*s.* on *Michaelmas* day in every year, by the overseers for the time being, to *William Warrington* and his successors, vicars of *Old Windsor*, in lieu of the vicarial tithe of the land so inclosed, and on which the cottages should be erected. A piece of land, part of the waste of the manor of *Old Windsor*, containing about four acres, was obtained about the same period, by virtue of a certain deed, made pursuant of the Inclosure Act of 29 *G.* 2, c. 36, between the major part of the owners and occupiers of lands, in the parish of *Old Windsor*, entitled to right of common of pasture, the devisees of the lord of the manor and the overseers of the poor, of the one part; and *James Bonnell* of the other part; whereby *Bonnell* covenanted to pay to the overseers 70*l.*, to be laid out in the purchase of ten tenements, for the use and habitation of the *poor* of the parish; which deed was usually kept in the parish chest, and was enrolled in the office of the clerk of the peace for *Berks*, in *April*, 1798; the expence of the deed was paid by the parish officers. The piece of land was afterwards fenced in with a hedge, and so continued from that time, being occasionally trimmed and cut by the parish officers. The overseers obtained the sum of 541*l.* from certain individuals, as recompences agreed to be given for the inclosure of the waste lands in *Old Windsor*, pursuant to certain agreements made under the provisions of the Statute, 29 *G.* 2, c. 36, according to which Statute, the money was to be applied to the relief of the poor, and accounted for as rates; and the said sums of 541*l.*, and 200*l*, shortly after 1797, were applied by the parish officers in the erection of eight cottages, on the said piece of land, (marked A, B, C, D, Y, Y, and Z, Z, in a plan annexed to the case.) Six of the cottages were in a line, and attached to each other; (A, B, C, D, and Y, Y; the two latter being in the centre,) the remaining two, (Z, Z,) were built on part of the same plot of ground, but at a distance from the other six.

A well was dug when the cottages were built, common to all of them, and was repaired by the overseers, at the expence of the parish; the neighbouring cottages were also permitted the use of it. An oven, bakehouse and privy,

were afterwards built by the overseers, out of the purchase money received for the waste land, and repaired by the overseers out of the poor-rate.

The two centre cottages, (Y, Y,) of the six built in a line, were, immediately upon their erection, used as a school-house, but afterwards, for the reception of the *parish paupers*, at the parish expence. The two cottages (Z, Z,) were used as the poor-house, and a space of ground thereto adjoining, (marked W,) was used by the dependant poor in that house. Other portions of the said piece of ground were occupied by labouring men, as gardens; but afterwards, used by the inmates of the poor-house. The two first, and two last of the six cottages, (A, B, and C, D,) from the time of their erection, were let to independent labourers, as yearly tenants, at 50*s.* a year, the rents being applied by the churchwardens to charitable purposes, in the same manner as the rents of the old cottages had been. The cottages might have been let however, at 2*s.* to 2*s.* 6*d.* per week each. The occupiers of the last-named cottages, were never assessed to the poor-rate in respect of them. Ten shillings a year, in lieu of vicarial tithes for the land, was paid to the vicar, out of the poor-rates, as before agreed upon. None of the persons accepted as tenants of the four cottages (A, B, and C, D,) were receiving parochial relief at the time; persons of industrious habits were selected as tenants, and the rent was regularly paid; but the tenants, being labourers, occasionally received parish relief, which was given without any deduction on account of the occupation of the cottages, the rents being always punctually paid by the tenants; except in regard to one *Thomas Pope*, tenant of one of the said four cottages, who paid till the year 1821, from which time the overseers, by a special order in vestry, paid the rent to the churchwardens; and upon two occasions when the tenants had died before the rent became due, the churchwardens gave credit for the amount of the rent, and applied the same to the charitable fund, and re-paid themselves out of the church-rate.

The eight original cottages (A, B, C, D, Y, Y, and Z, Z,) as also two others hereinafter mentioned, were kept in repair with funds obtained by the poor-rate.

The *paupers* of the parish were received into the cottages used as the poor-house, (Z, Z,) and likewise into those used as a school-house, (Y, Y,) and were lodged and maintained therein at the expence of the poor-rate; but the said cottages not being large enough to accommodate the paupers, two other cottages (X, X,) were built for that purpose, and so used up to the present time. The recently erected cottages (X, X,) as well as those formerly used as a school-house (Y, Y,) and a poor-house, (Z, Z,) together with the piece of land adjoining the said poor-house, were not in question in this cause.

The cottages (heretofore the school-house, Y, Y,) could contain ten paupers; the cottages (used as the poor-house, Z, Z,) seven paupers, and those recently erected (X, X,) seven paupers: but the numbers occasionally exceeded what could be contained in such last mentioned cottages, and the overseers, when such occurrence happened, procured the paupers to be received in a public-house, or elsewhere in the village, at the expence of the parish, and large sums had been expended accordingly. On two occasions, paupers had been received in two of the six cottages built in a line, (*viz.*, B, and D,) but the tenant received 2*s.* a week as rent, and a further payment for the paupers' board, from the overseers: but these were the only instances in which paupers had been received into these cottages.

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Part of the plot of ground obtained in 1797 was set out as gardens to the last mentioned four cottages, (A, B, C, D,) and occupied with them. The remainder was divided into small gardens, and appropriated by the churchwardens and overseers to the use of the labouring inhabitants of the parish, as applications were made. Many of the plots were, and still are, occupied by labourers, to grow vegetables, &c.; and they contributed to the poor-rate, but not in respect of such plots. Relief was occasionally given to the occupiers of the allotments, but quite independent of the occupation of the gardens, the relief not being increased or diminished on that account; the gardens were never appropriated by way of relief, and were never occupied in connection with any of the buildings.

The defendants' order, requiring the overseers of *Old Windsor* to deliver up the premises in question, was dated the 26th *January*, 1836; and the order of the Poor-Law Commissioners, directing the defendants to apply the premises in question for the purposes of the Acts of Parliament, was issued the 29th *February*, 1836.

The defendants, on the 8th *April*, 1836, previously to entering on the premises, demanded possession thereof.

The question for the opinion of the Court was, whether the defendants, on the 8th of *April*, 1836, were entitled to take the premises mentioned in the declaration, or any of them, under the authority of the Statutes 4 & 5 *W.* 4, c. 76, and 5 & 6 *W.* 4, c. 69, or either of them.

If the Court should be of opinion the defendants were not entitled to take any part of the premises, a general verdict was to be entered for the plaintiffs, with nominal damages: or if the Court decided that the defendants were authorized, as before mentioned, to take some part, but not the whole of the premises, the like verdict was to be entered for the plaintiffs, as to such part which the defendants had no right to take; and a verdict for the defendants, in respect to the premises to which their authority extended: and if the Court should be of opinion that the defendants had a right to take the whole of the said premises, then a nonsuit was to be entered.

The case was argued last *Michaelmas Term.*

Wilde, Serjt., for the plaintiffs, referred to the Statutes 31 *Eliz.*, c. 7, (repealed by 15 *G.* 3, c. 32); 43 *Eliz.*, c. 2, s. 5; 29 *G.* 2, c. 36, s. 2; and 59 *G.* 3, c. 12, ss. 12, 13, & 17. He contended that the four cottages (A, B, C, D,) and the land, could not be considered "workhouses" within the meaning of the 4 & 5 *W.* 4, c 76. The real question was, how those cottages had been *used*; the commissioners had no right to investigate the title-deeds by which the premises were held. The four cottages had been uniformly let to persons paying church and poor-rates, who, though they might be *poor* persons in the ordinary sense of the word, were not *poor* in the statutory sense; *i. e.*, *paupers*. There was nothing in the 5 & 6 *W.* 4, c. 69, to entitle the defendants to the property in question: by the 4th section, guardians are authorized "to take" certain property; but that means that they shall be capable of taking, and not that they are invested with any adverse powers to take buildings, &c. of their own authority. At any rate, there was no pretence for the claim set up to the small plots of ground; for in no sense, could they be said to fall within the statutory definition of the word workhouse, which is limited to "a house or building purchased, erected, hired, or used" for the reception of the poor.

Goulburn, Serjt., for the defendants, argued that the question was not limited to what had been the *user* of the premises in question in later years; but reference must be made to the original purpose for which they had been purchased (in a legal sense); he contended that it appeared from the various documents referred to in the case, that the whole were "purchased at the expence of the poor-rate," within the meaning of the 109th section of the Poor Law Amendment Act; and that any subsequent variation in their *user*, which might be inconsistent with their original appropriation, could not alter the effect of such appropriation. If the funds, out of which the cottages in question were built, had been applied to the erection of one large workhouse, and in consequence of the decrease of the number of paupers, part of the house had been let off to independent tenants, the house would not have ceased to be a "workhouse." As to the plot of land, (W,) the words "purchased" and "used," in the 109th section, would apply to land; and the word "*house*" includes *land; Com. Dig. Grant*, E. 11; *Co. Litt.* 5, b.

Wilde, Serjt., in reply, admitted that if the cottages in question had originally been appropriated to parish purposes, a temporary *user* of them, for other purposes, would not have enabled the plaintiffs to dispute the defendants' claim: but such *user*, in this case, had been continual; and the Acts apply to a state of things as they actually existed, and not as they might have existed. The authorities cited refer to land surrounding, and used in connexion with, a house, and cannot, therefore, apply to the small allotments which were let out without any reference to the cottages.

The Court took time to consider, and judgment was now delivered by

TINDAL, C. J.—This was an action of trespass, brought in pursuance of the order of the Lord Chancellor for the purpose of obtaining the decision of this Court upon the question, whether the defendants were entitled to take and use the premises, or any of them, described in certain proceedings in the Court of Chancery, for the purposes of the Statutes 4 & 5 *W.* 4, c. 76, and 5 & 6 *W.* 4, c. 69, or either of them. The question related to four cottages out of eight, which were marked upon the plan, A, B, C, and D; four pieces of land marked, 38, 39, 40, and 41, close adjoining to the said cottages; and thirty-seven small allotments, marked from No. 1 to No. 37, inclusively. And we are of opinion, upon the proper construction of the said Statutes, and the consideration of the facts stated in the special case, that the Guardians of the poor were not entitled to take and use any part of the premises above referred to. The authorities given by the first mentioned Statute to the Poor-Law Commissioners, so far as they relate to the present subject of enquiry, are given by the 23d section, *viz*, "to order and direct the overseers of any parish, having a workhouse or workhouses, or any buildings capable of being converted into a workhouse or workhouses, to enlarge or alter the same:" and the authority given to the commissioners by section 26, is to declare the union of as many parishes as they shall think fit, whereupon, 'the workhouse or workhouses of such parishes shall be for their common use:" and the commissioners may issue orders and regulations for the classification of such poor as may be relieved therein, and for other purposes; and the question will be, whether any of the cottages above specified, or any part of the land, either by reason of being held and used together with the cot-

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tages, their mode of occupation, or otherwise, can be considered to fall within the meaning of the term "*workhouses*," employed in the Act. If that word was received *in its ordinary* acceptation, it points to a building commonly found in most of the parishes in *England*, in which the paupers of the parish are lodged and kept, under the control of the parish officers, out of the poor-rate. But it must be allowed, that it is used in the Act, in a sense somewhat larger and more comprehensive. For, by the interpretation clause (sec. 109), it is enacted, that the word *workhouse* shall be construed to include "any house in which the poor of any parish or union shall be lodged and maintained, or any house or building purchased, erected, hired, or used at the expence of the poor-rate, by any parish, vestry, guardian, or overseer, for the reception, employment, classification, or relief of any poor person therein, at the expence of such parish;" and again, "the word *poor*," by the same clause, "shall be construed to include any pauper, or poor, or indigent person applying for, or receiving relief from the poor-rate in *England* and *Wales*, or chargeable thereto." The question, therefore, presented to us, must be determined by a comparison of the evidence stated in the special case, with the definition or interpretation above given by the Statute, and the inquiry becomes this; *First*, whether the cottages A, B, C, and D, are houses in which the poor of the parish were lodged and maintained: and we think the general mode of user of these four cottages, from the time they were built in 1797, down to the passing of the Statute above referred to, affords an answer to that question in the negative. It is not a single instance, or only a few instances of a pauper being placed in one or more of these cottages, that can be considered as giving to them the class or character to which they belong, but it must be the *general purpose* to which they were applied, during the whole or the greater part of the period to which reference is made. And we think the preponderancy of the evidence is very great, that they were, during that period, let out by the parish to independent labourers at annual rents, such rents being applied by the parish officers, not to the ordinary purposes of the poor-rate, but for the charitable purposes to which the funds, out of which the cottages were in part originally built, were destined by former benefactors to the parish. And we think this the more evident, from the distinction in the special case between the *user* of these cottages, and the others which are marked with the letters X, Y, and Z; in which latter it is stated, that the paupers of the parish have been received, lodged, and maintained at the expence of the poor-rate. If, then, the cottages in question do not come within the first part of the interpretation, which has a wider and a more comprehensive range, are they "buildings purchased, erected, hired, or used at the expence of the poor-rate, by any parish, &c., for the reception, employment, or relief of any poor person therein, at the expence of such parish?" This latter description, it is to be observed, involves two considerations; *First*, at whose cost the building was originally erected or purchased; and *Secondly*, the purpose to which it is put and employed by the parish. But although these considerations are separate and distinct from each other, yet unless both parts of the description concur and are found to apply to the same building, the case cannot, as it appears to us, be held to fall within the second branch of the statutory interpretation. *First*, if the only inquiry necessary to be made were this, whether these cottages were purchased, or erected, or hired at the expence of the poor-rate, the answer would be, that as to the part of the

original cost of the building, namely, to the extent of 200*l.*, they were clearly not built at the expence of the poor-rate: and as to the residue of such cost, namely, to the extent of 541*l.*, strictly speaking, they were not built out of the poor-rate; though, undoubtedly they were built out of a fund raised by the operation of the Inclosure Act, the 29 *G.* 2, which was placed in the hands of the churchwardens and overseers, to be applied as the poor-rates are, and in relief of the poor-rates: so that it would be very difficult to contend that the last mentioned sum is not to be considered as poor-rate within the meaning of this Act. As to the 200*l.*, indeed, if traced from its origin, it appears to be a fund originally composed out of benefactions given to the parish for particular charities, increased from time to time by the alteration of the property which had been purchased by the original fund, and other contributions, but still maintaining its character of a separate and distinct fund from the poor-rate; the distribution of the annual produce thereof being always set apart and applied for those purposes of charity for which it appeared to be originally destined. It must be admitted, however, that if the inquiry rested upon the single point of the cost of the building, it would be difficult to decide, with any satisfaction, whether these cottages formed workhouses or not. But there is coupled and combined with this description, in the Statute, the purpose to which the buildings are applied. And we think, as we have already stated, that these cottages, upon the facts set out in the special case, were neither "purchased, erected, or used for the reception, employment, or relief of poor persons therein," that is, of *parish paupers*, "at the expence of the parish." Having arrived at this conclusion, with respect to the cottages, it is almost unnecessary to say, that the same opinion will extend to the pieces of ground behind each, which are marked in the plan as Nos. 38, 39, 40, and 41; which pieces of ground, form part of, and are occupied with the same. As to the thirty-seven small closes of land, which, according to the case, have been usually allotted by the parish officers to the labouring inhabitants of the parish for the purposes of gardens, as the case states expressly that such allotments were made, without any reference to the labourers contributing or not contributing to the poor-rate of the parish, or receiving or not receiving parochial relief, we cannot see any circumstance belonging to the use of such land, which can bring it within the interpretation of a workhouse, as given by the Statute. Upon the whole, we think that there should be

Judgment for the plaintiffs

HITCHCOCK *v.* WALFORD, Clerk.

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TRESPASS for damaging and destroying two tombstones, and two other stones of the plaintiff's, and taking and carrying them away, and converting them to the defendant's own use; whereby the bones and other mortal remains of the ancestors of the plaintiff were exposed, &c.

To a declaration in trespass, the plaintiff pleaded two pleas; upon the first, issue was joined; to the second, the plaintiff replied and the defendant rejoined; the plaintiff demurred to the rejoinder: the defendant instead of joining issue on the demurrer, gave notice he should take no further steps on the second plea; the plaintiff signed judgment by *nil dicit* on the whole record. The Court set aside the judgment as irregular, and ordered the second plea, and all subsequent pleadings, to be struck out.

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Pleas:—*First*, that the tombstones, &c. were not the property of the plaintiff; upon which issue was joined: *Second*, as to pulling up, &c. the said tombstones, &c., *actionem non*; because the defendant before and at the time when, &c., was possessed of a certain close, commonly called the church-yard, wherein the said tombstones, &c. were affixed, and at the time when, &c. they were there doing damage to the grass and herbage, &c. growing in the said close; and that therefore he took up the said tombstones, &c. and conveyed them to a short and convenient distance, and there left them for the plaintiff.

Replication to the second plea, that the defendant converted the tombstones to his own use.

Rejoinder, admitting the conversion *modo et formâ*, as alleged in the plea. *General Demurrer.*

Instead of joining in demurrer, the defendant gave notice that he should take no further steps on the second plea. The plaintiff on this signed judgment by default upon the whole record.

R. V. Richards moved to set aside this judgment for irregularity, with costs. Issue having been joined on the first plea, which went to the whole declaration, that issue, which was a material one, ought to have been tried. The defendant's having declined to proceed upon the second plea, ought not to put the plaintiff in a better situation, than if he had obtained a judgment on demurrer to such plea: nor ought the defendent to be put in a worse situation, than if he had not pleaded the second plea at all. Before the Statute of *Anne* (*a*), there could only have been one plea, and if the party abandoned his defence, the plaintiff was entitled to have judgment upon the whole record; but since, by that Statute (*b*), a defendant may plead several matters; the practice is necessarily different.

Peacock shewed cause in the first instance.—The declaration was framed upon the precedent in *Spooner* v. *Brewster* (*c*). The plaintiff was authorized to sign judgment, when the defendant made default. In the times of *vivâ voce* pleading, the defendant appeared personally in Court, and if he wished for time, he obtained a continuance; if he said nothing, it was a default, and judgment of *nil dicit* was given against him; in the same manner as if the plaintiff did not appear, it was a default on his part, and he was nonsuited. Now here the defendant has committed a default, by not joining in demurrer; and the only course the plaintiff could adopt, was to sign judgment accordingly.—[*Tindal*, C. J.—Why should he sign it upon the whole record, instead of confining it to the particular plea to which the demurrer applied?]—The default applies to the whole action. There has been no *retraxit*, or *nolle prosequi*; and issue not having been joined, the defendant could not have had judgment of *relictâ verificatione* (*d*), there can be no other judgment for want of a rejoinder, than that of *nil dicit* as for want of a plea, and the plaintiff may strike out the previous pleadings, *Petrie* v. *Fitzroy* (*e*).—[*Tindal*, C. J.—Why should the plaintiff enter judgment by *nil dicit quoad hoc?* The better course would have been for the

(*a*) 4 & 5 Ann, c 16.
(*b*) Sec. 4.
(*c*) 3 Bing. 136; S. C. 10 Moo. 494; 2 C. & P. 34.
(*d*) See 2 Lill. Pr. Reg. 104.
(*e*) 5 T. R. 152.

plaintiff to have applied to the Court to strike out the plea.]—He might have done so, but still he was not wrong in adopting the course he has done.

TINDAL, C. J.—I think the plaintiff has mistaken his course, by applying the old doctrine which prevailed before the Statute of *Anne*, to the present state of things. The proper course now will be, to make the rule absolute for setting aside the judgment, and that the second plea, and all subsequent pleadings should be struck out; no costs to be paid on either side.

Rule absolute accordingly.

PARSONS *v.* PITCHER.

Jan. 31.

W. H. WATSON, on the 22d of *January*, had obtained a rule *nisi*, why the master should not review his taxation in this cause, and why the plaintiff should not refund certain costs already paid to him. The action was commenced in *April* last, for 16*l.*, no further steps were taken till the 21st of *October*, when the defendant, having offered 13*l.*, which was refused, took out a summons, why, upon payment of 11*l.* 8*s.* into Court, the plaintiff should not be deprived of any subsequent costs, if he should proceed with the action, and not recover a larger sum: and on the 27th *October*, an order was made to that effect. Nothing further was done on either side, till the 4th *November*, when the plaintiff called upon the defendant to pay the money into Court, and gave him notice that if he did not, the action would be proceeded with. Thereupon the defendant took out a summons for particulars, which was heard before *Park*, J., who, under the circumstances, refused to make any order. On the 7th, the defendant took out another summons for particulars for the 8th, on which day the plaintiff's attorney did not attend; but on the 9th, he delivered a declaration, with particulars annexed; on the 11th, the defendant paid the money into Court; and on the 16th, he pleaded. The plaintiff took the money out of Court; and on the 10th of *January*, his costs were taxed up to the time of the payment of the money into Court; and on the 12th, such costs were paid by the defendant.

The defendant being sued for 16*l.*, offered 13*l.* which was refused; he then obtained an order to pay 11*l.* 8*s.* into Court, and that the plaintiff should not have any subsequent costs. The defendant was afterwards applied to to pay the money into Court, but neglected to do so, and the plaintiff delivered a declaration; the defendant then paid the money into Court and the plaintiff took it out:—*Held*, the defendant was entitled to his costs from the time of the offer of payment.

Wilde, Serjt., shewed cause, and argued that the plaintiff had been compelled to proceed with the action, by the neglect of the defendant, in not sooner paying the money into Court, and that the master was right in allowing the plaintiff his costs up to the time of such payment in.

W. H. Watson in support of the rule, contended, that the defendant was entitled to his costs after the time of the tender; he relied upon *James* v. *Raggett* (*a*), *Marryott* v. *Clapp* (*b*), *Willis* v. *Darke* (*c*).

TINDAL, C. J.—I am not able to distinguish this case from *James* v. *Raggett*: the matter therefore must go back to the master.

Rule absolute (*e*).

(*a*) 2 E. & A. 776; S. C. 1 Chit. Pr. 471.
(*b*) 1 D. P. C. 701.
(*d*) 1 Tyr. & Gr. 503.
(*e*) See also *Burmester* v. *Hilch*, 13 East, 551; *Zecin* v. *Cowell*, 2 Taunt. 203; *Roberts* v. *Lambert*, *ib.* 283; *Gibbon* v. *Copeman*, 1 Marsh. 392; 5 Taunt. 840; *Sawbridge* v. *Conwell*, 4 Taunt. 255; *Lent* v. *Benton*, 2 Marsh. 478.

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Jan. 31.

By the *Tower Hamlets* Court of Requests' Act (23 *G.* 2), the commissioners have jurisdiction over debts under 40*s.*, and in any action for a debt under 40*s.* sued in any other Court, the plaintiff is to pay defendant his costs; and no suit for debts recoverable by that Act are to be brought in any other Court. By sec. 4, of 2 *W.* 4, c. lxv., (amending the former Act) the jurisdiction of the Court of Requests is extended to 5*l.*, but by sec. 10, the commissioners are not to determine any cause where the suit is for any sum *being the balance of an account originally exceeding* 5*l.*; and by sec. 23, actions which might have been brought in the superior Courts before that Act, may still be brought there. The plaintiff sued a defendant (resident within the jurisdiction of such Court of Requests) in the superior Court for the balance of an account originally exceeding 5*l.*, and recovered only 1*l.* 10*s.*:—*Held*, the defendant was not entitled to his costs.

GREEN *v.* BOLTON.

THIS was an action of debt, to recover 8*l.* claimed by the plaintiff, on the balance of an account for goods sold. The defendant pleaded *nunquam indebitatus* as to 1*l.* 10*s.*; and as to the rest, payment. At the trial before the sheriff, the plaintiff recovered a verdict for 1*l.* 10*s.* only. The defendant resided in the *Tower Hamlets*, and within the jurisdiction of the Court of Requests, established there by the Statutes 23 *G.* 2; 19 *G.* 3, c. 68; & 2 *W.* 4, c. 65 (*a*).

C. Jones, had obtained a rule *nisi*, to enter a suggestion on the roll to deprive the plaintiff of his costs, under these Statutes.

Channell, shewed cause.—He relied upon the 10th section of 2 *W.* 4, c. 65, as shewing that the commissioners had no jurisdiction, as the original demand exceeded 5*l.*; the plea of payment admitted that fact; the effect of this section was to repeal so much of the former Act as gave the plaintiff his costs, in cases where "the debt to be recovered by the plaintiff did not amount to 40*s.*" (He made other objections as to the period and nature of the application, but the Court confined their judgment to this point.)

(*a*) By the 23 *G.* 2, it is enacted, that "any person who shall have owing unto him the sum of 40*s.*, by any person residing or inhabiting, &c." within the district of the Tower Hamlets, may summon the debtor before the commissioners, who are to give judgment thereon; and it is further enacted, that "if any action of debt, &c., be sued or prosecuted against any person, in any of the King's Courts at *Westminster*, or elsewhere, out of the said Court of Requests, and it shall appear to the judge or judges of the Court where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff in such action doth not amount to the sum of 40*s.*, and the defendant shall prove that, at the time of commencing the action, he was resident within the said district, and liable to be summoned before the Court of Requests for such debt, then such judge or judges shall not allow to the plaintiff any costs of suit, but shall award that the plaintiff shall pay costs to the defendant." And it is further enacted, that "no action or suit for any debt not amounting to the sum of 40*s.*, and recoverable by virtue of this Act in the said Court of Requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in *any other Court whatsoever*."

The 2 *W.* 4, c. 65, was passed "to amend and render more effectual" the former Acts. By sec. 4, three commissioners were empowered to determine debts when under 40*s.*; and five, when under 5*l.* By sec. 10, it is enacted, that "nothing in the said recited Acts, or in that Act contained, shall extend so as to enable the said commissioners to judge, determine, or decide on any debt, for any sum being the balance of an account *on demand*, [*Sic*] originally exceeding five pounds." By sec. 23, "all actions and proceedings which, before the passing of that Act, might have been brought in any of his Majesty's Courts at *Westminster*, or otherwise, may still, notwithstanding that Act and the powers thereby granted, be brought and determined in either of the said Courts at *Westminster* or otherwise, at the election of the party suing or proceeding, in the same manner as if that Act had not been passed."

C. Jones, in support of the rule.—The 2 *W.* 4, was passed "to amend and render more effectual" the former Act, not to repeal it. If the 10th section of the new Act stood alone, there would be some difficulty in the case, but coupled with the 23d section, it is clear that debts under 40*s.* are left to the operation of the former Act; the sum recovered by the plaintiff, was the *debt* in this case (*b*), and being under 40*s.*, the former Act applies.

TINDAL, C. J.—I am unable to put any construction but one upon the 10th section of the 2 *W.* 4. It seems to me, that it expressly excludes from the jurisdiction of the commissioners, all cases where the original debt or demand is above 5*l.*, and the plaintiff sues for a balance of account (*c*). The 23d section appears to be added *ex majori cautelâ*, and it merely reserves a right to the plaintiff to bring actions in the superior Courts, which he might have brought before that Act; the effect of which is, that a plaintiff may still sue in the Courts at *Westminster* for a debt amounting to 40*s.*, though it be under 5*l.* The rule must be discharged, but without costs.

BOSANQUET, J.—I am of the same opinion. The 10th section positively restrains the inferior Court; and the 23d is entirely in favour of the superior Courts, and not of the inferior ones.

Rule discharged without costs.

(*b*) See *Baddly* v. *Oliver*, 1 C. & M. 219; 1 D. P. C. 598.

(*c*) See the following decisions upon this point, upon the Court of Requests' Acts—for *Blackheath*; *Carden* v. *Burford*, 2 M. & R. 170; *Moreau* v. *Hicks*, 1 Har. & Wol. 87; 4 N. & M. 563; 2 A. & E. 782; *Pope* v. *Banyard*, 3 M. & W. 424;—for *Boston*; *Abbey* v. *Lill*, 2 Moo. & P. 534; 5 Bing. 299;—for *Rochester*; *Harsant* v. *Larkin*, 7 Moo. 68; 3 B. & B. 257;—for *Southwark*; *Fountain* v. *Young*, 1 Taunt. 60; *Porter* v. *Philpot*, 14 Ea. 344.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS.

IN

Easter Term, 1 Victoria, 1838.

The Judges who sat in Banc this Term were the LORD CHIEF JUSTICE, MR. J. PARK, MR. J. BOSANQUET, *and* MR. J. COLTMAN.

WEBB *v.* SMITH.

Common Pleas.

April 18.

In debt for penalties under the 2 *G.* 2, c. 24, s. 7, (the Bribery Act): *Held, first*, that the allegation in the declaration that "the defendant corruptly gave *J. J.* 10*l.*" was sustained by proof that the defendant being in an outer room gave *J. J.* a ticket, and sent him into an inner room, where another person, upon production of the ticket, gave him 10*l.*

Secondly, that evidence of similar transactions between the defendant and other parties not named in the declaration, occurring on the same day and at the same place, were admissible in order to shew the defendant's knowledge of the nature of the transaction, and to establish co-operation between him and the party who actually gave the money.

Thirdly, that to prove the issuing of the sheriff's precept to a mayor of a borough, to proceed to the election of members of parliament, an examined copy of a document purporting to be the original precept, lodged in the crown office of the Court of Chancery, was the proper evidence.

It is the duty of the sheriff to return the precept to the crown office, together with the writ and indentures.

DEBT for penalties under the 2 *G.* 2, c. 24, s. 7 (*a*), (the Bribery Act), for bribing a voter at the *Bridgwater* election. The declaration was in the usual form (*b*), setting out the issuing of the writ to the sheriff, and the making and delivery of his precept to the mayor of *Bridgwater*, and that the defendant did corrupt one *John Jones*, who had a right to vote, &c., *by corruptly giving to him the sum of* 10*l.* as and for a reward for his vote: there were two other counts on similar charges as to two other parties.

At the trial before *Bosanquet*, J., at the last *Taunton* Assizes, in order to prove the issuing of the precept, the under-sheriff was called, and stated that the precept was always returned to him by the mayor, and that he, the under-sheriff, generally kept it; but that he sometimes sent it to the crown office with the writ of indentures, that he had searched for this particular precept

(*a*) By which it is enacted, that "if any person by himself, or any person employed by him, shall, by any gift or reward, or by any promise, agreement or security for any gift or reward, corrupt or procure any person to give his vote in any election, such person so offending shall forfeit 500*l.*"

(*b*) See 7 Wentw. 340; 2 Wils. 395; 1 T. R. 235; 4 N. & M. 585.

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and not being able to find it, he had no doubt he had so returned it. An examined copy from the crown office was then received in evidence. To prove the bribery, *Jones* was called, who stated, that during the election he had seen the defendant in a room at a public-house in *Bridgwater;* that a conversation took place between them, the result of which was, that the witness was to vote for a particular party, and to receive 10*l.*; that thereupon the defendant wrote down the witness's name upon a ticket, gave it him, and directed him to go into an inner room; that the witness did so, and saw another person there, who upon the production of the ticket gave him 10*l.* Evidence was then gone into to shew that other parties, not named in the declaration, had received similar tickets from the defendant, which had in like manner been exchanged for money by the person in the inner room. The plaintiff recovered a verdict, but leave was reserved to the defendant to move.

Bompas, Serjt., now moved accordingly for a rule *nisi*, to enter a *nonsuit*, or for a new trial.

The ground for the new trial was, the improper admission of evidence. *First*, as to the copy of the precept. The precept itself ought to have been produced, as in *Dickson* v. *Fisher* (*c*), *Grey* v. *Smithyes* (*d*), for the precept is not a record (*e*), and therefore, an examined copy of it was not receivable in evidence, especially as it was not in the proper custody, for the mayor or the sheriff was the proper officer to have kept it, the latter not being ordered by the writ to return the precept, but merely the writ itself. The copy produced did not prove by itself that the document, of which it was a copy, was an original, *Adamthwaite* v. *Synge* (*f*).—[*Tindal*, C. J.—If the precept got to the crown office in the regular course, how are we to say that it is not the proper place of deposit?—*Park*, J., the under-sheriff says he sent it to the crown office, and it is found there: surely that is sufficient.—*Bosanquet*, J.—I was of opinion at the trial, that if the precept had remained with the sheriff, it ought to have been produced; but that if it were sent to the crown office, it became a record, and an examined copy was then sufficient.—*Tindal*, C. J.—The proper return is of the indentures, but the precept would be annexed to it as part of the machinery.]—It is no part of the legal return merely because it is sent in conjunction with the indentures. The writ does not allude to the precept.

Secondly, as to the evidence adduced to show the bribery of other parties not named in the declaration. This evidence was produced by the plaintiff for the purpose of shewing the greater probability that the defendant would commit bribery; it was submitted on the part of the defendant, that having no connexion with the transactions charged in the declaration, it was like giving evidence of one felony in order to prove the commission of another; the learned judge thought the evidence admissible, not for the purpose for which it was adduced, but in order to shew a *scienter* on the part of the defendant (*g*). But it was not like the case of uttering forged documents or

(*c*) 4 Burr. 2267.

(*d*) *Id.* 2273; see also *King* v. *Pippet*, 1 T. R. 235; *Mead* v. *Robinson*, Willes, 422.

(*e*) In *Grey* v. *Smithyes*, 4 Burr. 2274, it was stated by *Morton*, *arguendo*, that the precept was a record; see also *Mead* v. *Robinson*, *ut supra*, 426.

(*f*) 4 Camp. 372.

(*g*) In *Mead* v. *Robinson*, *ut supra*, a similar objection was taken, but it was overruled by this Court; but there it appeared, that the evidence objected to had been elicited on cross-examination by the defendant's own counsel.

false coin, where the *scienter* was material; it would be a great hardship on the defendant if such evidence were admissible, as he could not be prepared to meet the cases set up. There is no doubt, that if a prosecutor could shew that a prisoner had committed other felonies, it would induce the jury to think it probable he had committed the one he was charged with; but such evidence is not admissible.—[*Tindal*, C. J.—The mere act of giving a ticket was in itself harmless; the giving the 10*l.* in exchange for it was the *indicium* of guilt; if then it could be shewn that the defendant had been giving these tickets all day long, it would shew that he knew what he had been about. In the case of counterfeit money there is the same hardship that is complained of in this case, but the evidence is necessary to shew the guilty knowledge.] —The guilty knowledge is not here the *gist* of the charge, as in that case; it would be straining the doctrine of *scienter*, to extend it to such a case as the present. In an action for libel, evidence of other libels is not receivable, yet they would show malice.—[*Bosanquet*, J.—The object of the evidence was to shew the co-operation between the defendant and the person in the inner-room. I remember Lord *Ellenborough* holding at the *Old Bailey*, that if it was necessary to shew what a man had been doing, the prosecutor might prove that he had committed different felonies in the same night.]—Here the acts proved where wholly unconnected with the offence charged.

The ground for the nonsuit was, that the allegation in the declaration "that the defendant did corrupt *J. Jones*, by corruptly giving him 10*l.*" was not proved; the Statute says, "if any person *by himself*, or *any person employed by him*, shall corrupt any person, &c.," the statement in the declaration must mean that the defendant corrupted *Jones* "by himself;" the learned judge told the jury if they believed *Jones*, the plaintiff was entitled to a verdict.—[*Bosanquet*, J.—I put it as a case of co-operation between the defendant and the party in the inner room, and I told the jury, that in such a case, the act of one man was in law the act of the other, and *Jones* proved the co-operation.]—The correct way of setting out the transaction would have been, to state that the defendant gave *Jones* "a certain piece of paper as a security for 10*l.*," not that he gave him 10*l.*: that allegation was not proved; it is clear the money was not the defendant's, he had no controul over it. The Statute draws a distinction between a party's doing the act *by himself* and *by some one employed by him*.—[*Tindal*, C. J.—The object of the Statute is to affix the penalty both to the person whose mind is moving to the bribery, and to the agent who actually bribes.—*Bosanquet*, J.—If this had been a case of felony, the evidence would have shewn both parties to be principals; until the defendant gave the ticket no money could be obtained.]—The statute points out a distinction between a *gift*, a *promise*, and a *security*, and this being a most penal Statute, it ought to be construed with great strictness.

TINDAL, C. J.—Upon the first point, as to the admissibility of the copy of the precept, the Court will take time to consider; with regard to the other two objections, I think there is no ground either for a new trial or a nonsuit. As to the first of these objections, the improper admission of evidence as to other acts of bribery, I am of opinion that it was properly admitted. The ground of the charge against the defendant is, that being stationed in the outer room, he gave a ticket to a voter who went into an inner room and got 10*l.* from another party, upon producing the ticket; and evidence was adduced to show

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he had gone through a similar process with other parties; the proper ground why this evidence was admissible strikes me as being, not in order to show the probability of the defendant's having committed the particular act of bribery with which he was charged, but (as it was received by my brother *Bosanquet,*) in order to show that the defendant must have been cognizant of the proceedings in the inner room. The giving the ticket was only a step in the transaction, and it was necessary to affect the defendant with a guilty knowledge of the operation of such ticket. The other objection is, that the averment in the declaration that the defendant did corrupt a particular voter by giving him 10*l.* was not proved; that the facts established did not shew that he gave the money himself. I agree, that if it had been shewn that he merely gave a promise or a security, it would have come within the words of the Statute, and should have been charged accordingly; but I look upon the allegation that he gave the money to *Jones*, as substantially proved. The voter, after a conversation with him, gets a ticket, goes into an inner room and gets the money; it appears to me to be the same thing in principle, as if he had pointed out the money in a drawer to the voter; and that it was only a circuitous manner of delivering the money to him. Upon these two points, therefore, the rule must be refused.

PARK, J.—It was urged in argument upon the second point, that in an action for a libel, another libel could not be given in evidence; but in *Macleod* v. *Wakley* (*h*), it was held, that such evidence was admissible in order to shew, *quo animo*, the libel complained of had been written, and the same rule obtains in actions for slander (*i*), upon the principle upon which evidence of a similar character is admitted in cases of uttering false coin. I do not think it necessary to go into the other point, as I entirely agree with the Lord Chief Justice.

BOSANQUET, J.—I retain the opinion I held at the trial, that the evidence in question ought to be received. It was important to ascertain whether or not the defendant knew what was the effect and fruit of the ticket he gave to *Jones;* and for this purpose, it was material to show how he had acted on the same day, at the same place, under similar circumstances, in order to prove his cognizance of the whole transaction, and his co-operation with the party in the inner room. If it had been proposed to show that the defendant had acted in the same manner at another time, under different circumstances, I do not think such evidence would have been admissible As to the last question, it is urged that the offence was not properly charged, that the money was not given by the defendant himself; but it is difficult to see how the offence could have been otherwise charged. The result of the argument that has been pressed upon us would be, that the defendant was not liable at all, and that no agent ever would be. If the party who employs the agent can be got at, no doubt he would be punishable; but the legislature certainly meant that the agent should also be liable. If two persons are together, one of whom has a purse, and the other upon obtaining a promise from a voter says to the former "give him 10*l.*," and he does so, there is no doubt but that would be bribery by

(*h*) 3 C. & P. 311; see also *Lee* v. *Huson*, Peake, N. P. C. 166; *Plunkett* v. *Cobbett*, 2 Selw. N. P. C. 1042, 6th ed.; 5 Esp. 136.

(*i*) See *Mead* v. *Daubigny*, Peake, N. P. C. 125; *Rustell* v. *Macquister*, 1 Camp. 49, n.; *Jackson* v. *Adams*, 1 Hodg. 78.

the latter himself; and that is this case, as soon as the co-operation between the parties has been established.

COLTMAN, J.—The statute contemplates two cases, bribery committed by *a person himself*, and *by another*; the present case falls within the former class; the act of bribery did not consist in giving the ticket, but in giving the money; and in order to fix the defendant with this offence, it was necessary to show his co-operation with the party in the inner room; it would therefore, in my opinion, have been improper to have excluded the evidence in question. It is often necessary, in order to shew the mind of the party, to give collateral transactions in evidence.

Rule refused upon the two last points.

April 20.

TINDAL, C. J.—As to the first objection that was raised in this case, namely, that an examined copy of the sheriff's precept to the mayor, was not admissible in evidence, we have looked into the point, and are of opinion that the evidence was properly admitted. The copy in question was produced from the crown office, but it was argued on the part of the defendant, that that was not the proper place of custody for the original, that it ought not to have been returned there, and therefore that the original itself ought to have been produced; but looking at the exigency of the writ and of the precept, and at the indenture, we think it was the sheriff's duty to return both the writ and the precept. The writ to the sheriff requires him to proceed to the election, to insert the names of the persons elected in certain indentures (*j*) to be made between himself and the electors, to certify the election to Chancery, and to remit one part of the indentures, together with the writ (*k*). The precept delivered by him to the returning officer of the cities and boroughs in his county (*l*), incorporates the writ, and requires the mayor or other returning officer of the borough to proceed with the election, and continues thus, "and how this my said warrant shall be executed, you shall make known to me immediately after the said election made, *so that I may certify the same, together with the said writ and this precept, to our Lord the King*, in his Chancery, forthwith" (*m*). The sheriff therefore requires that the precept should be returned to him, in order that he may certify it to the King in Chancery, therefore, when the precept is handed over to him, it is indorsed thus, "the execution of this precept appears in *the schedule* hereunto annexed" (*n*). Then the sheriff's return is indorsed on the writ in these words, "The execution of this writ appears in certain *schedules* hereunto annexed" (*o*), the word *schedules* here being in the plural. It appears to us therefore, that if the sheriff does not return the precept, together with the writ, it is an act of

(*j*) See 7 *H.* 4, c. 15, s. 5.

(*k*) See the form, *Finnelly on Elections*, App. ij; *Wordsworth on Elections*, App. cclxxxix.

(*l*) See 23 *H.* 6, c. 14; 7 & 8 *W.* 3, c. 25.

(*m*) See *Finnelly*, App. iii; in *Wordsworth*, (App. ccxci,) the form runs thus, "and this precept *return* to our Lord, &c." By 23 *H.* 6, c. 14, "the mayor and bailiffs, &c., shall lawfully return the precept to the same sheriffs by indentures betwixt the same sheriffs and them to be made, of the same elections, and of the names of the citizens and burgesses, by them so chosen, and thereupon every sheriff shall make a good and rightful return of every such writ, and of every return by the mayor and bailiffs, &c., to him made."

(*n*) *Fin. ibid.* *Words. ibid.*

(*o*) *Fin. ibid.* *Words.* ccxc.

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negligence on his part. The practice is thus stated in *Rogers on Elections*, p. 31, 2d ed., "Returns are made by the officers, who act under the precepts, tacking their indentures of return to the precepts, and forwarding them to the sheriff, and he tacking these to his own return for the county to the writ, forwards the whole together to the clerk of the crown in Chancery." It is remarkable, that in *Mead* v. *Robinson* (*p*), an objection was taken exactly the converse to the present, for the original precept was there produced from the custody of the sheriff, and it was objected that it was not admissible, and that the precept, together with the indenture, ought to have been returned and filed in Chancery, *and that a copy of the precept on record ought to have been produced.* The Court however, overruled the objection, thinking, that at any rate, the original was better evidence than the copy. Upon this point as well as the others, we think there should be no rule.

The learned serjeant took nothing by his motion.

(*p*) Willes, 422, 426.

April 18.

DRIFFILL *v.* TAYLOR.

An affidavit sworn in pursuance of R. H. 48 *G.* 3, for the purpose of obtaining an order to arrest the defendant in trover, is a *business depending* in Court, within the meaning of 11 *G.* 4, & 1 *W.* 4, c. 70, s. 4, and therefore any judge of the superior Courts may make such an order at chambers, though the cause is not in progress in the Court to which he belongs.

THIS was an action of *trover*, in which the defendant had been arrested during the vacation, by an order of Lord *Abinger*, C. B., sitting as the vacation judge at chambers (by virtue of the 4th sec. of 11 *G.* 4, and 1 *W.* 4, c. 70), upon an affidavit sworn before a commissioner of this Court.

The defendant had applied to *Park*, J., at chambers, to be discharged upon entering a common appearance, on the ground that the Lord Chief Baron had no jurisdiction to make the order in question; and his lordship had made an order *nisi* accordingly, against which,

Adams, Serjt. now shewed cause.—The ground on which the present order was obtained was, that there was no "business depending in any of the Courts" at the time Lord *Abinger* made the order for the defendant's arrest, so as to give his lordship jurisdiction under the Statute. But the swearing the affidavit was sufficient to satisfy the terms of the Act, *Ex parte Smith* (*a*). That case was decided upon the 3 *G.* 4, c. 102, which is repealed by the 11 *G.* 4, and 1 *W.* 4, c. 70; but the principle applies to the present case. It was necessary to have an affidavit in order to warrant the arrest, pursuant to *R. H.* 48 *G.* 3 (*b*): and the fact of the affidavit having been sworn before a commissioner of this Court, makes no difference: if it had been before a commissioner of the *Exchequer*, Lord *Abinger* would have had jurisdiction over the matter as depending in his own Court; and for this purpose, he was by virtue of the 11 *G.* 4. and 1 *W.* 4, a judge of this Court. Drawing an affidavit of debt has been held to be business done in the Court, so as to give the Court jurisdiction to order an attorney's bill to be taxed, *Winter* v. *Payne* (*c*).

(*a*) 7 D. & R. 382.
(*b*) 9 Ea. 325; 1 Taunt. 203; 1 Arch. Pr. 95 4th ed.
(*c*) 6 T. R. 645.

Whitehurst in support of the order.—*Ex parte Smith* cannot be considered as a binding authority; it was a case decided upon its own circumstances, and the application was not opposed. *Winter* v. *Payne* was decided upon the 2 *G.* 2, c. 23, s. 23, which mentions "*charges at law*;" these words have a much more extended signification than those of the Act now before the Court. An affidavit to hold to bail cannot be considered as any part of the action, *Richards* v. *Stuart* (*d*). There was no business in Court at the time Lord *Abinger* made the order.

TINDAL, C. J.—This case must be determined by reference to the Statute 11 *G.* 4, and 1 *W.* 4, c. 70, the words of which are so comprehensive, that it appears to me, they include the present case; the 7th section enacts, "That every judge of the said (superior) Courts, to whatever Court he may belong, is authorized to transact such *business*, at chambers or elsewhere, *depending in any of the said Courts*, as relates to matters over which the said Courts have a common jurisdiction, and as may, according to the course and practice of the Court, be transacted by a single judge." If the affidavit, upon which the application to Lord *Abinger* was made, had been sworn in Court, there would clearly have been a "business depending in Court;" and the fact of its having been sworn before a commissioner, does not, I think, make any difference. I am not desirous to fritter away the meaning of the Act, which is a very beneficial one; and I am of opinion, that the Lord Chief Baron had authority, under the Act, to make the order in question. The order of my brother *Park* therefore will be discharged.

PARK, J.—The main question in this case is, whether the Lord Chief Baron had jurisdiction to make the order, to set aside which, the present order has been obtained. I consider the Act of Parliament in question to be an extremely wholesome one, as so much business is now transacted at chambers. When this case was before me, I entertained some doubt upon the word *depending*, used in the Statute, as to whether merely swearing an affidavit for the purpose of obtaining an order for arresting a defendant in an action of trover, could be said to be a business depending in a Court. I am, however, reconciled to the opinion expressed by my Lord, and entertained, as I understand, by the rest of the Court, that the affidavit in question being made for the purpose of putting the process of the Court in motion, must be considered as business *depending* in the Court, within the meaning of the Act.

BOSANQUET, J.—Technically speaking, the affidavit was not the commencement of the suit; but the Act does not require there should be a *suit* depending, but that there should be *business* depending, in order to give the jurisdiction; and looking at the language of the Statute, I think this is a case which clearly comes within its operation, for all the Courts "have a common jurisdiction" in actions of trover, and also in making orders for arresting the defendant in such actions; and such order is a matter which may, "according to the course and practice of the Court, be transacted by a single judge:"

(*d*) 10 Bing. 323; S. C. 3 Mo. & Sc. 778; 2 D. P. C. 754.

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then, as it relates to the commencement of a suit, I think it may fairly be said to be a "business depending" in Court.

COLTMAN, J., concurred.

Order discharged.

April 19.

ROWE *v.* COBHAM.

The Court will not make a prospective order, that the master shall tax the costs in a particular manner.

IN this case, the defendant had obtained a summons to stay proceedings upon payment of a certain sum, which the plaintiff refused to accept, but which (it having been paid into Court) he afterwards took out, and then abandoned the action.

Martin, (who cited *James* v. *Raggett* (*a*), *Hale* v. *Baker* (*b*), *Gover* v. *Elkins* (*c*), applied for a rule, that the master might allow the defendant his costs from the time of the summons: the costs had not yet been taxed.

Per Curiam.—We never make a prospective rule of this kind. We cannot assume that the master will do wrong.

Rule refused.

(*a*) 2 B. & A. 776; 1 Chit. R. 471.
(*b*) 2 D. P. C. 125.
(*c*) 3 M. & W. 216; S. C. 1 Horn & Hurl. 16; 6 D. P. C. 335; see *Parsons* v. *Pitcher*, *ante*; 4 Bing. N. C. 306; 6 D. P. C. 432; and *Cumming* v. *Columbine*, 6 D. P. C. 373.

April 24, 26.

NEWTON & UX. *v.* HARLAND and another.

If a tenant of part of a dwelling-house holds over after the determination of the term, and the landlord distrains upon the tenant, and afterwards on the same day forcibly ejects him; *Quære*, whether in an action by the tenant for the assault, the landlord can justify in defence of his possession.

TRESPASS for assaulting the plaintiff's wife, and ejecting her from part of a house. *Pleas*:—*First*, not guilty; *Second*, that the defendant was lawfully in possession of the house, and turned out the plaintiff's wife in defence of such possession. *Replication* to second plea, *de injuriâ*.

At the trial, before *Parke*, B., at the last Assizes for *Yorkshire*, the following facts appeared in evidence. Mr. *Newton*, the plaintiff, had taken the premises in question of the defendant, *Harland*; on the 2d of *March*, 1837, (Mr. *Newton* being then away from home, but his wife and family being upon the premises), the defendants, at half-past eight a.m., came to the house and levied a distress for a quarter's rent; after all the goods distrained had been *removed* from the premises, the plaintiff, Mrs. *Newton*, locked up all the rooms and retired to her bed-room; at five p.m., she was requested by the two defendants to deliver up the keys to them and to leave the house, and having refused, the defendants, with the assistance of a blacksmith and several other parties, broke open all the doors and forcibly ejected Mrs. *Newton*. A witness, called by the plaintiff, proved that the defendant *Harland* had previously expressed his intention of turning Mrs. *Newton* out by force, if she would not leave; and upon cross-examination, he stated that

at the same time, *Mr. Harland* said that the term expired on the 2d *March*, and that he had given the plaintiff notice to quit. The learned Baron upon this stopped the case, saying that the witness had proved the defendant's case; and the plaintiff declining to be nonsuited, the defendant, under his lordship's direction, had a verdict.

Wilde, Serjt., in last *Michaelmas* Term, obtained a rule *nisi* for a new trial, upon the ground of misdirection.—He argued, that upon the facts proved, there was no defence to the action, but if there were, the evidence should have been left to the consideration of the jury. The plaintiff was in possession of the premises, and was so treated by the defendant in having distrained upon him (*a*). After the determination of a term, the landlord is entitled to re-enter peaceably, *Taunton* v. *Costar* (*b*), or even to break open the doors, if the tenant has quitted possession, *Turner* v. *Meymott* (*c*): but he is not justified in turning out the tenant's family, *Hillary* v. *Gay* (*d*). The defendant here had effected his second entry into the rooms in such a manner as to make it a forcible entry under the Statute, 5 *R.* 2, c. 8; *Com. Dig.* (*e*); therefore, the entry by the defendant being illegal, he could not justify an assault as in defence of a lawful possession. Besides, there was no sufficient evidence of the termination of the tenancy (*f*).

R. Alexander, Q. C., and *Tomlinson*, now shewed cause.—The direction of the learned Baron was correct. There was sufficient evidence to show that the tenancy was determined; the plaintiff having called a witness to prove part of a conversation between him and the defendant, the latter had a right to have the whole of that conversation given in evidence; *The Queen's* Case (*g*); and his assertion, that the tenancy expired on the 2d of *March*, then became evidence for him, *Smith* v. *Blandy* (*h*). Then if a tenant remain on premises, in which his interest has expired, he is a mere *tenant at sufferance*, 2 *Bl. Com.* 150 (*i*), and the landlord may lawfully enter and eject him without being liable in trespass; though if he commit a breach of the peace in so entering, he is liable to an indictment for a forcible entry, *Turner* v. *Meymott* (*j*).

(*a*) By 8 *An.* c. 14, s. 6, 7, a landlord is empowered to distrain within six months after the determination of any lease, and *during the possession* of the tenant.

(*b*) 7 T. R. 431.

(*c*) 7 Moo. 574; S. C. 1 Bing. 158.

(*d*) 6 C. & P. 284.

(*e*) *Forcible entry*, A. 1, 2; and see Hale, P. C. 138.

(*f*) There was another question raised as to the pleadings, but as nothing turned upon it, the argument thereon is omitted.

(*g*) 2 Brod. & B. 297.

(*h*) Ry. & Moo. 257.

(*i*) Citing Co. Litt. 57.

(*j*) In Hawk. P. C. B. 1, c. 28, (3), it is said, "It seems that, at the common law, a man disseised of any lands, or tenements, (if he could not prevail by fair means), might lawfully regain the possession thereof by force, unless he were put to a necessity of bringing his action, by having neglected to re-enter in due time." But in a note to this passage Mr. *Curwood* says, (vol. 1, p. 494, ed. 1824,) "this *dictum* of *Hawkins* has been questioned. It is said that an indictment at common law will lie for a forcible entry," and he refers to *R.* v. *Storr* (3 Burr. 1698); that case does not, however, support the position. In *R.* v. *Bake*, (3 Burr. 1731,) *Wilmot*, J., indeed said, "no doubt, an indictment *will lie at common law* for a forcible entry;" and in *R.* v. *Bathurst*, (Sayer, R. 225,) *Foster*, J., laid down the same doctrine (p. 226,) and *Ryder*, C. J., seemed to take it for granted (p. 227,) but in neither of these cases is there any reference to the passage in *Hawkins*, nor is there any authority cited in support of the opinions expressed by the learned judges. In *R.* v. *Wilson*, (8 T. R. 357, referred to by Mr. *Cur-*

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The landlord, having the right to the land, acquired by entry the lawful possession of it, and might have maintained trespass against the plaintiff

wood, ut supra,) it was held upon demurrer, that an indictment at common law charging twelve defendants with having *unlawfully*, and *with a strong hand*, entered the prosecutor's mill, and expelled him from the possession, was held to be good; the above mentioned passage from *Hawkins* was referred to in argument, but Lord *Kenyon*, C. J., expressed his opinion that "there was no doubt but that the offence of forcible entry was indictable at common law" (p. 360,) and *Grose*, J., (p. 361,) and *Le Blanc*, (p. 363,) coincided in this opinion on the authority of the cases of *R.* v. *Bathurst*, *R.* v. *Storr*, and *R.* v. *Bake*, (as to which see the foregoing observations.) Lord *Kenyon*, however, took occasion, on a subsequent day in the term, to revert to the decision, and to say that it left untouched the question as to whether a party might enter, at common law, with force into that to which he had a legal title, inasmuch as the Court came to their decision upon the ground that the indictment alleged that the defendants entered *unlawfully*, and therefore they could not intend that they had any title. On the other hand, *Hawkins* refers to *Lambard*, (*Eirenarchia*,) p. 135, B. 2, c. 4; *Dalton*, (*Justice of the Peace*,) c. 76, (125 ed. 1697) (a); Cromp. 70, all of which fully bear out his position. See also *Pulton*, *De pace regis et regni*, Ch. 3, fo. 34, ed. 1610. The question however, would seem to be settled by the following passages from *Bracton*, *L.* 4, c. 5, (temp. H. 3,) "Si vero aliquo prædictorum modorum facta fuerit disseysina, primum et principale competit remedium tale, videlicet, quod ille qui ita disseysitus fuit, *per se, si potuit, vel sumptis viribus, vel resumptis*, dum tamen sine aliquo intervallo, *flagrante disseysina et maleficio, rejiciat spoliantem*, vel si tenens cum fuerit in possessione sive in seysina, et alius cum eo uti voluerit, ipse nihilominus utatur, nisi omnino injuste utentem tenere possit ab utendo exclusum: quia per usum suum sic utendo, juste retinet seysinam suam, alius vero utendo injuste in alieno, nihil sibi per usum injustum acquirit. Si autem ipsum nullo modo expellere possit, ad superioris auxilium erit recurrendum, ut ei pacifice liceat acquirere et quiete uti. Incontinenti vim vi repellere est, quam cito sciri possit vim esse illatam, priusquam ille cui illata fuerit, ad actum contrarium divertat. Si autem omnino quis uti impediverit, vel minus commode, incontinenti repellatur si fieri possit, alioquin ad superiorem recurratur ut supra. *Incontitenti* autem quid sit, videndum, et infra quod tempus, &c.;" and this from *Britton*, c. 44, (temp. E. 1—which appears to be a paraphrase from the passage from *Bracton*, above cited,) "Le premer remedie pour disseisine est al disseisi *de recoiller amys et force*, et sauns delay faire (apres ceo que il le purra saver) *engetter les disseisours*, et si plus ne puit, au meyns se teigne en sa possession ovesque les disseisours, et use sa seisine quant que il purra, et issint ne averont jammes les disseisours fraunk tenement, si par le gree noun le verrey seigneur. Si les disseisours eyent en peisible seisine par long temps en presence del disseisi, adonques ne list point al disseisi eugetter les disseisours sauns jugement. Et pur ceo fait a enquerer ou le disseisi fuit en temps de la disseisine." Both these writers then proceed to show (to adopt the words of *Lambard*) "that a certaine respite of time was given to the *disseisee* (according to his distance and absence,) in which it was lawful for him to *gather force, armes, and his friends*, and to throw the disseisor out of his wrongful possession." Upon this chapter in *Britton*, M. *Houard* (the editor of the "Traités sur les Coutumes Anglo-Normandes," Rouen, 1776;) has appended a note, in which he remarks, that this kind of domestic warfare (*guerres privées*,) was lawful in cases of disseisin, against the lord, the suzerain, and even against the king himself, but with two grand limitations, first, that the vassal could only arm his relations and *friends*, (that is to say the defendants on his manor,) but *not strangers*, otherwise his tenure was lost; and secondly, that these domestic wars were only permitted by law, that the right of possession might be discussed and examined, and in order that, until such right was decided, neither of the parties might suppose that his adversary had, by his silence, approved the seizure of his possessions. See also 4 Bl. Com. 148.

(a) In this edition there are several chapters added to the original work, but the chapters of the former editions are referred to by the prefix of the letter *V.* (*Vetus.*)

for continuing in possession, *Butcher* v. *Butcher* (*k*). A party having the mere naked possession may maintain trespass against a stranger, but not against the owner, *Chambers* v. *Donaldson* (*l*). If the plaintiff meant to insist upon any violence used in putting his wife out of possession, he should have replied the excess.—[*Tindal*, C. J.—Suppose the landlord had proceeded by what is termed a *Welsh* ejectment, and had commenced untiling the house, would he not have been liable in trespass? Such cases sometimes occur at the Assizes, and the parties recover damages.]—Such cases must depend on their own circumstances. *Hillary* v. *Gay* is not good law. They also cited *R.* v. *Oakley* (*m*), *R.* v. *Wilson* (*n*), as to the general law of forcible entry.

TINDAL, C. J.—It is certainly a question of very great and general importance, whether a landlord, having put an end to a term by notice, may enter upon the premises in any manner, and eject the tenant, without being liable to him in a civil action, if he use any violence in so ejecting him. The argument on the part of the defendant, has gone the length of contending that a landlord might break open the outer doors and turn out the party in possession, and thereby himself obtain *lawful* possession; if, however, the entry is illegal, it follows that a party cannot thereby obtain a lawful possession; I think, however, that the facts of this case are not sufficiently before the Court to enable us to give any judgment upon this important question; and for that reason, the case had better go down for a new trial.

The other judges concurred.

Rule absolute.

April 27.

Where a plaintiff was called to the bar after the commencement of the suit, the Court refused to restore the venue to *Middlesex* at his request.

W. H. Watson, moved that the venue in the above cause might be restored from *Yorkshire* to *Middlesex*, upon the ground that the plaintiff was a barrister. The action was commenced in *Easter* Term, 1837; since which time, the plaintiff had been called to the bar; but he submitted that would make no difference, as the principle is the same, and was laid down for the benefit of clients, and not of the party to the suit. There was another question as to whether the plaintiff was entitled to what he asked, inasmuch as he sued

It seems, therefore, that by the common law it was lawful for a disseisee to regain *by force* the possession of lands of which he had been *unlawfully* disseised. *Hawkins* has accurately traced the progress of the law, (in the chapter above referred to,) by the Statute of *Northampton*, (2 E. 3,) by which the use of arms whereby to strike terror into the persons upon whom a forcible entry was made, was declared illegal and punishable, and the statutes 5 R. 2, c. 7; (which is said to have been passed in consequence of the insurrections under *Wat Tyler* and *Jack Straw*; see *Barrington's Obs. on Anc. Stats.* p. 332;) 15 R. 2, c. 2; 8 *H.* 6, c. 9; 31 *El.* c. 11; & 21 *J.* 1, c. 15. Before the statute of *H.* 6, there does not appear to have been any *civil* remedy against a party making a forcible remedy; that statute, however, gave an action of forcible entry (see F. N. B. fo. 248,) by which the tenant might recover treble damages, if *illegally* dispossessed by such entry, that is, if the party so entering had no title to the lands, for the *title* and not the *force* was put in issue by that action, (Bro. Ab. *Forcible Entrie*, 5, 11, 29); but if the dispossessor had the legal title, still the tenant might *indict* him under the statute of *H.* 6, and thereby recover possession, (F. N. B. *ut supra.*)

(*k*) 7 B. & C. 399; S. C. 1 M. & R. 220.

(*l*) 11 East, 65.

(*m*) 4 B. & Ad. 307; S. C. 1 N. & M. 58.

(*n*) 1 A. & E. 627; 3 A. & E. 817; S. C. 1 H. & W. 387; 2 H. & W. 225; 3 N. & M. 753; 6 N. & M. 625.

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together with his wife; and the rule as laid down in *Tidd's Practice* (*o*) was against him; on this point, however, the Court gave no opinion.

TINDAL, C. J.—We cannot help seeing that the Courts will not be sitting at *Westminster* at the time when this trial will come on in *Yorkshire;* the plaintiff's clients, therefore, are not likely to suffer by his absence; besides, his being called to the bar was a voluntary act on his part, after he had commenced his action; and he has no right to avail himself of that act, to put the other side to inconvenience.

Rule refused.

(*o*) Page 637, 6th ed.; see also Imp. Pr. C. P. 210, 6th ed.; *Drew* v. *Rose*, 2 Ld. Ray. 1398; *Robarts* v. *Muson*, 1 Taunt. 254.

April 19.

In the matter of EADY and others to AMES.

An affidavit (verifying the certificate, that a married woman, resident abroad, had acknowledged a deed pursuant to 3 & 4 *W.* 4, c. 74, s. 85,) sworn before a *British Consul* is not sufficient; it should be sworn before either the local Courts, or some person authorised by the law of the land to administer oaths.

MEREWETHER, Serjt., moved that a certificate of a married woman, residing abroad, having acknowledged a deed, and the affidavit of verification might be filed of record, pursuant to 3 & 4 *W.* 4, c. 74, s. 85 (*a*). In this case, the affidavit verifying the certificate, had been sworn before the *British Consul* at *Hamburgh*, and the motion was made upon affidavits stating that the Consul himself had informed the parties there was no other person there capable of administering an oath. The officer of the Court, however, had thought himself bound by the cases of *Riddel*, plaintiff, and *Nash*, deforciant (*b*), and *Ex parte Hutchinson* (*c*), and refused to file the certificate; the learned serjeant relied upon the case *Domville*, demandant, *Kinderley*, tenant, and *Collier*, vouchee (*d*), to show that the Court would look favourably upon a case situated like the present.

Tindal, C. J.—By the 85th section the officer of this Court is to see that the certificate is "duly verified by affidavit;" and the question is, whether what is now produced to the Court is a proper affidavit. I think the parties must make another attempt, and apply to the judges of the Courts at *Hamborough;* or if the affidavit be sworn before any person, who by the law of that country has power to administer an oath, that, upon the production of a certificate that he has such power, will satisfy us.

The learned Serjeant, therefore, took nothing by his motion (*e*).

(*a*) By sec. 83, in cases where a married woman by reason of being beyond seas, &c., is prevented from acknowledging a deed executed by her, before a judge, &c., the *Common Pleas* may appoint special commissioners for taking such acknowledgement. By sec. 85, such certificate, "*together with an affidavit* by some person, verifying the same, &c., shall be lodged with some officer of the *Common Pleas*, and such officer shall examine the certificate, and see that it is duly signed and *duly verified by affidavit*, &c., and if all the requisites shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of *Common Pleas*."

(*b*) 8 Moo. 632.

(*c*) 1 M. & P. 559; S. C. 4 Bing. 606.

(*d*) 3 Taunt. 275.

(*e*) See *In re Trustees of Barber*, (1 Hodg. 318; 2 Sc. 436; 2 Bing. N. C. 268; 4 D. P. C. 640), it was held that a *British Consul* had authority to *certify* the handwriting and authority of a commissioner who receives the acknowledgement of a married woman.

HALL *v.* SWIFT.

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April 20.

In *case* for obstructing the plaintiff's right to a water-course, which was not set out by metes and bounds, it is no answer that within twenty years the stream had intermitted flowing, or its channel had been altered.

CASE for obstructing the plaintiff's water-course. *Pleas:—First,* not guilty; *Second,* traversing the plaintiff's right to the water.

At the trial, before *Alderson,* B., at the last *Stafford* Assizes, it was proved that the defendant's land was separated from that of the plaintiff's, by a lane; that in the former (which was more elevated than the latter), there were certain springs from which the water ran down a spout across the lane into the plaintiff's land; that several years ago the water had ceased to flow, but about nineteen years back it had commenced flowing again; and that in 1835, the channel, by which the water had formerly flowed into the plaintiff's land, had been changed. The plaintiff recovered a verdict with nominal damages.

Maule, Q. C., now moved for a trial, on the ground; *First,* that the plaintiff had no right to the new channel in which the water had flowed since 1835; and *Secondly,* that the right to the water was at any rate not more than nineteen years old, owing to the previous intermission of the flowing.

TINDAL, C, J.—I think that neither of these objections ought to be allowed. As to the first, it appears that the water did actually flow into the plaintiff's land before the year 1835, when some alteration took place in the situation of the channel; the defendant seeks to set up this as an answer to the plaintiff's right. If the line of the stream had been described by metes and bounds, there might be some ground for this objection; but as it is, if the defendant's position be correct, the slightest alteration in the channel would be sufficient to destroy the plaintiff's right; and the same rule would be applicable to a foot-path, the right to which might be lost by the path being merely straightened. As to the second objection, that the water had intermitted flowing within twenty years, that might have been from defect of water during a dry season, or other natural causes.

The other judges concurring.

Rule refused.

ROBERTSON *v.* WILDE.

April 21.

An article, published in a magazine, imputing that the plaintiff, who was secretary to a rail-road company, had brought the Company into disrepute by certain letters written by him, and by other acts, is a libel upon the plaintiff.

THIS was an action for libel tried before the Lord Chief Justice at the last sittings for *London.* The plaintiff was the secretary of the *Eastern Counties Railway Company,* and the defendant was the publisher of a work called "*The Railway Magazine,*" where the alleged libels appeared; they were set forth in three counts, as follows: first, "We are sorry to see the

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correspondence which has taken place between the secretary of this Company and Lord *Petre;* had invention been taxed to blast the character, and throw a deep shade over the honour of the Company, it could have devised nothing more effectual than this stupid correspondence, and still more stupid publication of it. The facts are as we stated them in our last. The Company agreed not to go through Lord *Petre's* ground, or if they did, to pay him 20,000*l.* for the land, and 10,000*l.* for the damage. That such an agreement ought never to have been entered into, was clear from the correspondence; because it ought either to have been made in good faith, or not at all. From the letters of the secretary, it appears that it was not intended to be kept, for he talks of penal sums, which mean, we suppose, trickery and deception. But worse is yet to come: 'In answer to your letter,' says Lord *Petre*, in a note addressed to the secretary, 'I beg to state that the assertions which you make are not facts,' and the same serious charge is repeated, but in other terms, by his lordship's solicitors. We presume that the directors must feel deeply indebted to Mr. *Robertson* for the glittering honours and brilliant fruits of his *cacoethes scribendi*. To admit a breach of faith, and to be taxed with deliberate falsehood, for that is the real meaning of the matter; these are not the services by which every secretary can distinguish his directors; the question is, are they worth 800*l.* a year?" Second, "We understand the board of directors—we beg pardon, Mr. *Robertson*, intends to put in such an answer to Lord *Petre's* allegation, as shall astound the very walls of the Court of Chancery; but we can assure him that shuffling and low cunning will not succeed in that Court. Can he get rid of the attempt to outwit Lord *Petre*, which appears clearly from the correspondence, and which hangs as a dark cloud over the honour of the directors?" Third, "At length we have goaded the ruler of this Company to a show of doing something more than living in fat contented idleness on the money of the shareholders." The article proceeded to state, that it had been pompously advertised that their works were in full operation, reciting the number of men alleged to be employed upon the works, and remarking that the number would only afford "about four men to a mile, or barely enough to keep the weeds down." The article then continued, "can this advertisement proceed seriously from men of business, or is this another result of Mr. *Robertson's* scribbling propensities? Is it for these scribbling exploits he receives 800*l.* a year?"

Erle, Q. C., now moved for an arrest of judgment, on the ground that the alleged libels, if any, were upon the Company, and not upon the plaintiff; there was nothing to show but that the acts, which were spoken of as having been done by the plaintiff, were not done by the authority of the Company; *their* credit might have been lowered by the articles in question, but no injury could be done to the plaintiff.

TINDAL, C. J.—It is impossible to read either of the extracts as set out in the different counts, and not to see that it was the intention of the writer to impute want of discretion to the plaintiff, in bringing the Company into disrepute.

The other judges concurred.

Rule refused.

DOE, dem. GATEHOUSE *v.* REES.

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April 21.

Where there was a provision in a lease, that in case of the bankruptcy or *insolvency* of the tenant, the lease should be forfeited, and the landlord might re-enter, and the tenant took the benefit of the Insolvent Act, (being at that time indebted to his landlord for goods), but the landlord subsequently received rent from him:—*Held*, that this was a waiver of the forfeiture.

EJECTMENT to recover a public-house, on a demise laid in *January* 1838. It was tried before *Vaughan*, J., at the last *Sussex* Assizes, when it appeared that in 1831, the premises in question were let by the lessor of the plaintiff to the defendant; the lease contained a proviso, that in case the tenant should become bankrupt or *insolvent*, or the term should be taken in execution, the lease should be forfeited, and the lessor might re-enter. In 1836, the defendant had been discharged under the Insolvent Act, at which time there was a debt due to the lessor of the plaintiff and his partner, for beer, which debt had never been paid; the lessor of the plaintiff, however, had received rent of the defendant up to *Christmas*, 1837. The action was brought upon the alleged forfeiture of the lease, by reason of the insolvency in 1836, but the defendant insisted that the forfeiture had been waived by the subsequent receipt of rent, of which opinion was the learned judge, and the defendant therefore, had a verdict.

Andrews, Serjt., now moved for a new trial; he argued that the insolvency still continued, and that the lessor of the plaintiff might avail himself of it at any time; the term *insolvency* means the inability of a person to pay his just debts, and does not import that he should have been discharged under the Insolvent Debtor's Act; *Parker* v. *Gossage* (*a*), *Riddlecombe* v. *Bond* (*b*). The discharge under the Act was no release of the debt.—[*Coltman*, J.—Had the landlord called for payment of the old debt since *Christmas?*]—It did not appear that he had.

TINDAL, C. J.—The whole question turns upon the condition in the lease, which in certain events is made, not void, but only viodable; the forfeiture, therefore, may be waived by the landlord, and the question is, whether it has been so waived in the present case. No doubt the landlord might have insisted upon the forfeiture of the lease at the time the defendant took the benefit of the Insolvent Debtor's Act, but instead of doing so, he subsequently accepts rent from him, and thereby admits that the relation of landlord and tenant subsisted between them. He cannot, therefore, blow hot and cold: he has acknowledged the defendant as his tenant up to *Christmas*, 1837, and does not show that anything has happened since to give him the right to re-enter. As to this being a continuing insolvency, a man cannot be said to be insolvent who goes on paying his rent, and merely does not pay a particular debt which he is not called on to pay; if that were so, the non-payment of *any* debt, to however small an amount, and for however short a period, would constitute insolvency. The cases which have been cited were

(*a*) 2 C. M. & R. 617; S. C. 1 Gale, 259; 1 Tyr. & Gr. 105.

(*b*) 5 N. & M. 621; S. C. 1 Har. & Wol. 612; 4 Ad. & E. 332; see also *per Le Blanc* and *Bayley*, Js., in *Bayley* v. *Schofield*, 1 M. & S. 353, 4, *acc.*; *In re the Birmingham Benefit Society*, 3 Sim. 421, *cont.* on the construction of 33 *G.* 3, c. 54.

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instances where single substantive acts were to take place in case of the insolvency of a party, and there was nothing like a waiver there; they cannot therefore, govern the present case.

PARK, J., concurred.

BOSANQUET, J.—The two cases cited, shew that a discharge under an Insolvent Act is not necessary to constitute *insolvency*. Here, however, there *has been* a discharge, and there is no doubt, therefore, that the landlord might have insisted upon the forfeiture of the lease, but he has waived the forfeiture by the subsequent receipt of rent. It is said, however, that as the debt was contracted before the discharge, and still continues in existence, the defendant must still be taken to be insolvent; but that does not at all follow: there is no doubt the defendant *might* be insolvent now, but the *onus* of proving that lies upon the plaintiff, and he has offered no proof whatever of that fact; he has only proved that the debt has not been paid, but he has not shewn the state of the defendant's assets, or even that he has been called upon since his discharge to pay the original debt.

COLTMAN, J.—This being a case of forfeiture, the landlord was bound to make out his case, and prove that the lease was forfeited, but he has failed to do so. He has shewn an act of insolvency which would have amounted to a forfeiture, if he had chosen to avail himself of it; but he has clearly waived that forfeiture, and cannot now set it up again.

Rule refused.

April 23.

NEWTON and UX. *v.* HARLAND and another.

In an action for excessive distress, in which several distinct issues were raised, the jury returned a verdict for the plaintiff generally, and it was so entered by the associate, but the *postea* was afterwards amended by the judge's notes, and the verdict was entered for the plaintiff upon two issues only, and for the defendant upon the rest: —*Held*, that the defendant was entitled to have the costs of the issues found for him, deducted from the plaintiff's costs, such issues not being immaterial.

THIS was an action for an excessive distress; the declaration contained nine counts, including one in *trover*. The defendant had pleaded several special pleas, by which the following issues were raised; *First* (upon the general issue), whether the defendant was guilty of the alleged grievances; *Secondly*, whether the plaintiff had tendered the sum of 25*l.*, alleged by the defendant to be due to him for rent; *Thirdly*, whether the defendant had sold for the best price; *Fourthly*, whether the defendant had sold more than was necessary, and paid the surplus to the plaintiff; and *Fifthly*, whether the defendant had given a proper notice of the distress. At the trial, before *Parke*, B., at the last Summer Assizes at *York*, the jury having retired to consider of their verdict, the learned baron had left the Court before it was given in, the associate remaining to receive it. The jury returned a verdict for the plaintiff generally, and the associate so entered it; but the learned baron afterwards (on the 18th *November*) amended the *postea* according to his notes, and ordered the verdict to be entered for the defendant upon all the

issues but the first and second (*a*). The costs had been taxed in *Michaelmas* vacation, and the master had deducted the costs of the issues entered for the defendants on the *postea*, from the plaintiffs' costs (*b*).

Newton now moved that the master might review his taxation, which he contended had proceeded on a wrong principle.—He cited *Goodburne* v. *Bowman* (*c*), where it was held, that if immaterial issues are found in favour of the defendant, and judgment is afterwards entered for the plaintiff *non obstante veredicto*, neither party is entitled to the costs of the immaterial issues. —[*Bosanquet*, J.—But you have not moved for judgment *non obstante veredicto*, and are too late to do so now, as such a motion ought to have been made in the four first days of last *Michaelmas* Term (*d*).]—The plaintiff was not bound to move for judgment *non obstante veredicto*; and the principle, laid down in the case cited, will apply to any case where the verdict has been entered for the defendant upon immaterial issues.

TINDAL, C. J.—But it does not appear that the issues, which have been found for the defendant here, are immaterial. The rule says, "the costs of all issues *found or the defendant* shall be deducted from the plaintiff's costs;" and as the *postea* comes before us, I think the master has done right in the course he has adopted.

Rule refused.

(*a*) *Newton* moved in last *Michaelmas* Term to set aside this order, but he took nothing by the motion, the Court observing that the course pursued was of ordinary occurrence (a), and that it was only a question as to costs, as it was clear from the nature of the issues, that the same witnesses that were called as to one issue, must have been called to the whole.

(*b*) See R. 74, H. 2 *W.* 4.

(*c*) 9 Bing. 667; S. C. 3 Mo. & S. 69; 2 D. P. C. 206.

(*d*) See R. 65, H. 2 *W.* 4.

(a) See *Eddowes* v. *Hopkins*, (1 Doug. 357,) *Petrie* v. *Hannay*, (3 T. R. 659.) *Richardson* v. *Mellish*, (11 Moo. 104; 3 Bing. 334; S. C. in error, 1 B. & C. 819,) *Henley* v. *Lyme Regis*, (3 M. & P. 310; 6 Bing. 100.)

MAYHEW and another *v.* HOADLEY.

April 24.

ARNOLD moved for an attachment against a sheriff, for not bringing in the body. The writ was tested in this Court; but in the copy delivered to the defendant at the time of the arrest, (pursuant to 2 *W.* 4, c. 39, s. 4,) he was required, by mistake, to put in special bail in the Court of the *Exchequer* of Pleas; and the defendant had put in bail there accordingly. The sheriff had been ruled to bring in the body in this Court.

An attachment will not be granted against a sheriff for not bringing in the body into the *Common Pleas*, where in the copy of the writ delivered to the defendant he was required to put in bail in the *Exchequer* of Pleas, and bail had been put in accordingly.

PARK, J. (*a*)—Under these circumstances we certainly cannot attach the sheriff.

Rule refused.

(*a*) The only judge in Court.

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April 28 & 30.

HOULDITCH *v.* CAUTY.

Upon the dishonour of a bill of exchange, the plaintiffs (indorsees) wrote to the defendant, (a previous indorser,) "we are surprised to hear that Mrs. *G.'s* bill (the one in question) was returned to the holder unpaid;" afterwards in the same day, the defendant saw the plaintiffs, and said, "he was much surprised the bill was not paid, and that he would write to the parties and see it paid:"—*Held*, sufficient to satisfy the averment that the defendant had received notice of the dishonour (*a*).

The defendant pleaded that the plaintiffs and other creditors of *W. C.* (a prior indorser of the bill,) had entered into a composition with him, whereby they released and discharged him from all liability upon the said bill; in support of this plea, a *Scotch* "assignation" was produced, whereby, after reciting that the plaintiffs had taken certain steps against *W. C.* to recover the amount of the bill (850*l.*) it appeared that in consideration of 116*l.* the plaintiffs assigned to *D. R. S.* the right of prosecuting such claim:—*Held*, that this did not support the plea, (even supposing it had been amended by striking out the allegation of the composition with the other creditors), inasmuch as it did not amount to a release of *W. C.* from his liability upon the bill

If an attorney refuse to produce a deed, as prejudicial to his client, (who is not a party to the suit,) *quære*, whether secondary evidence of its contents can be given?

ASSUMPSIT upon two bills of exchange, the first drawn by *F. Parsons*, and accepted by *C. Chaplin* for 100*l.*, and indorsed by *Parsons* to the defendant, and by him to the plaintiffs; the second drawn by *Ann Gib* and accepted by *W. H. Rainsford*, and indorsed by *Gib* to *W. Crokat*, by him to the defendant, and by the defendant to the plaintiffs. The pleas upon which the questions in the case arose, were,

The *third* (to the first count), that after the indorsement of the bill and before the commencement of the suit, to wit, on, &c., in consideration that divers persons whose names are to defendant unknown, creditors of the said *C. Chaplin*, then had agreed and did agree among themselves, and with said plaintiffs and said *C. C.*, to give time to said *C. C.* to pay to them, the said creditors, the debts to them respectively due, to wit, that the said *C. C.* should set apart a certain sum of money, to wit, the sum of 200*l.* annually out of his income and property; and said plaintiffs agreed to receive rateably, with the said other creditors of the said *C. C.*, payment of the said money in the said bill of exchange mentioned, and interest thereon, out of the said sum so set apart in full satisfaction and discharge of the premises in the first count of the declaration mentioned. That it was further then agreed, and a part of the said agreement between the said creditors of the said *C. C.* and the said plaintiffs and the said *C. C.*, that he should have time to pay the said money due in respect of the said bill of exchange in the first count mentioned, that is to say, until it should become due in respect of the said setting apart of the said annual sum by the said *C. C.* in manner hereinbefore mentioned, without the knowledge or consent of the defendant, and thereby then released and discharged the said *C. C.* from all liability upon the said bill of exchange, except as in this plea mentioned, without the knowledge or consent of the defendant. That according to the said agreement and time given, the plaintiffs would not be entitled to receive full payment of the said sum of money in the first count mentioned, until a long time after the said bill had become due, to wit, twelve months afterwards; and this the defendant is ready to verify, &c.

The *fifth* (to the second count), traversing the notice of dishonour.

And the *sixth* (to the second count), that after the indorsement of the bill of exchange in that count mentioned, and before the commencement of this suit, to wit, on, &c., in consideration that divers persons, whose names are to defendant unknown, creditors of the said *W. Crokat*, then accepted and received of and from the said *W. C.*, a certain sum of money, to wit, 2*s.* 6*d.* in the pound upon their respective debts, in full satisfaction and discharge of

(*a*) See *Norris* v. *Salomonson*, 3 Hodg. 14; 4 Sc. 257.

their respective debts, the plaintiffs then being the holders of the bill of exchange in the second count mentioned, accepted and received of and from the said *W. C.* the like sum of 2*s.* 6*d.* in the pound upon the amount of the bill of exchange in the second count mentioned, that is to say, 106*l.* 5*s.*, in full satisfaction and discharge of the bill of exchange in the second count mentioned, without the knowledge or consent of the defendant. And the plaintiffs thereby wholly released and discharged the said *W. C.* from all liability upon the said bill of exchange in the second count mentioned, without the knowledge or consent of the defendant; and this the defendant is ready to verify, &c.

At the trial, before *Coltman*, J., at the Sittings during last Term, no evidence was offered in support of the second plea; a letter of licence said to have been granted to *C. Chaplin* (the acceptor of the first bill), not being forthcoming. In order to prove the notice of dishonour of the bill mentioned in the second count, a letter was produced from the plaintiffs to the defendant, which, after speaking of the first bill, proceeded thus: "We are also surprised to hear that Mrs. *Gib's* bill was returned to the holder unpaid;" and it was proved that on the afternoon of the day on which the letter was written, the defendant called on the plaintiffs with the letter at their counting-house, and, in a conversation, said, "he was much surprised the bill was not paid, and that he would write to the parties in *Edinburgh*, and see it paid." In support of the sixth plea, a *Scotch* "assignation" by the plaintiffs to one *David Robertson Souter* was given in evidence, whereby the plaintiffs, in consideration of 116*l.* 13*s.* 5*d.*, assigned to *Souter* their debt from *W. Crokat*(*b*). The instrument was produced by Mr. *Weir*, a writer to the signet, who

(*b*) This instrument, after reciting the bill of exchange and the protest thereof for non-payment, and that the plaintiffs had raised letters of horning thereon, at their instance and at the instance of *Andrew Craig M'Lehose* as their mandatory, and by virtue thereof had caused charge the said *W. C.* to make payment to them or their mandatory of the said principal sum and interest thereon; and that in virtue of the said letters of horning and the warrant to arrest therein contained, they caused arrestments to be used against the said *W. C.*, in the hands of the trustees of the deceased *John Crokat*, and that upon the said diligence the plaintiffs raised and intended a summons of forthcoming before the lords of council and sessions, against the said trustees and against the said *W. C.*, but no further steps had since been taken therein; and that the trustees had raised and intended a summons of multiplepoinding and exoneration against the plaintiffs and their said mandatory; proceeded thus:—"And whereas, in consideration of the sum of 116*l.* 13*s.* 5*d.* paid to our said mandatory for our behoof, by *D. R. Souter*, accountant, in *Edinburgh*, we the said *John* and *James Houlditch*, as a company, and as individuals aforesaid, have agreed to grant the assignation underwritten. Therefore, we the said *John* and *James Houlditch* as a company, and we the said *John Houldítch* and *James Houlditch* as individual partners of that company, with the consent of the said *A. C. M'Lehose* our said mandatory, for any interest he may have in the premises as aforesaid, have made, constituted, and appointed, and we do hereby make, constitute, and appoint the said *D. R. Souter* and his heirs and donators, our lawful cessioners and assignees, in and to the foresaid principal sum of 850*l.* sterling, contained in and due by the bill above narrated, and the whole interest due and to become due thereon, as also in and to the said bill registered, protest, letters of horning, and executions of arrestment above mentioned, whole tenor and contents thereof, with all that has followed or may be competent to follow thereon; but that in so far allenarly as the said principal sum and interest thereof, and the said bill and diligence hereby assigned, are or can form the grounds of a claim of debt at our instance against the said *W. Crokat*, or through him, against the trustees of the said deceased *J. Crokat*; reserving always to us, our heirs and

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stated, that by the law of *Scotland*, it would operate as a release to the defendant. It being objected on the part of the plaintiff, that at any rate this deed did not support the plea, which alleged a composition with other creditors of *W. Crokat*, the defendant craved leave to amend, but it was refused by the learned judge. The plaintiff recovered a verdict on both bills.

In last Term, *Thesiger*, Q. C., obtained a rule *nisi* to reduce the damages by 850*l.* (the amount of the second bill), or for a new trial generally, upon three grounds; *First* (as to the first bill), he produced an affidavit accounting for the non-production of the letter of licence, and stating that it had been discovered to be in the possession of a Mr. *Stedman* (the attorney for *C. Chaplin*), whom the defendant undertook to serve with a *subpœnâ duces tecum*, to attend at the next trial, if the Court granted one; *Secondly* (as to the second bill), that the notice of dishonour was sufficient. He cited *Hartly* v. *Case* (*c*),

assignees, all right of recourse against the acceptor, drawer, and indorsers of the said bill, other than the said *W. Crokat*, for the balance of the said principal sum of 850*l.* sterling, and the interest due and to become due thereon, and for all expences which we have incurred or may incur in recovering payment thereof. As also we, with consent aforesaid, do hereby assign the said *D. R. Souter* and his aforesaids, in and to the foresaid summons of forthcoming, raised and intended at our instance against the said trustees of the said deceased *J. Crokat*, with all that has followed or may be competent to follow thereon, together with all right, interest, and claim competent to us as arresting creditors aforesaid, and raisers of the said process of forthcoming under the foresaid process of multiple-poinding and exoneration, brought at the instance of the said deceased *J. Crokat*; surrogating and substituting the said *D. R Souter* and his foresaids in our full right and place of the premises as aforesaid, with full power to them to ask, crave, and uplift from the said *W. Crokat*, or from the trustees of the said *J. Crokat* arrestees foresaid, the principal sum and interest hereby assigned, and upon payment, to grant discharges or conveyances thereof either in whole or in part; as also with full power to the said *D. R. Souter* to appear in the foresaid process of forthcoming at the instance of us and our said mandatory, and to sist himself as pursuer thereof in our place, and also to appear and sist himself as defender in the foresaid process of multiple-poinding and exoneration, brought at the instance of the said trustees of the said *J. Crokat*, in our place, and to lodge claims and interests in the said processes, dispute preferences therein, and recover payment of such sum or sums as shall be allocated to the defendant, hereby assigned and generally to do every other thing concerning the premises, which we could have done ourselves before granting hereof; declaring always, that any further proceedings under the diligence against the said trustees or the said *W. C.* hereby assigned, or any steps to be taken in the said processes of forthcoming and multiple-poinding and exoneration, or either of them, or otherwise, shall always be at the expence of the said *D. R. Souter* and his foresaids; declaring also, that the said proceedings shall not be taken in surnames; which assignation, to the extent above written, and under the reservation and declarations foresaid, we bind and oblige ourselves and our heirs and successors to warrant to the said *D. R. Souter* and his aforesaids, from all facts or deeds done or to be done by us in prejudice hereof. And whereas the foresaid bill, registered protest and letters of horning, form the grounds of debt at our instance against the said acceptor, drawer and indorsers of the said bill, other than the said *W. C.*, and so cannot be delivered up along with the assignation; therefore, we bind and oblige ourselves and our foresaids, to make those writs forthcoming to the said *D. R. Souter* and his foresaids, on all necessary occasions previously to our obtaining a settlement of the balance of the said debt from other parties to the bill, upon their granting a receipt and obligation to return the same within a short time and under a suitable penalty."

(*c*) 4 B. & C. 339; S. C. 6 D & R. 505; 1 C. & P. 555.

Solarte v. *Palmer* (*d*), and *Boulton* v. *Welch* (*e*). *Thirdly*, (as to the sixth plea), that the effect of the "assignation" was to discharge *W. Crokat*, as alleged in that plea; and that the fact of other creditors not being a party to it made no difference; or at any rate, the defendant should have been allowed to amend.

Wilde, Serjt., *Kelly*, Q. C., and *Petersdorff*, now shewed cause.—As to the first point, they submitted that the affidavit on the part of the defendant could not avail him, for that a judge at *Nisi Prius* would not compel Mr. *Stedman*, being the attorney of *C. Chaplin*, to produce a document which might be prejudicial to the interests of his client, *Cocks* v. *Nash* (*f*).—[*Tindal*, C. J.—Suppose the attorney refused to produce the document, would not the judge receive secondary evidence of its contents?]—In *Mills* v. *Oddy* (*g*), *Parke*, B. had intimated that such evidence was admissible in such a case (*h*). But in *Doe*, dem. *Bowdler* v. *Owen* (*i*), Lord *Abinger*, C. B., said, in his opinion, that case was not law. The counsel intimated, however, that if the Court were disposed to grant a new trial solely upon this point, the plaintiff would abandon that bill, and take a verdict upon the second count only.

As to the second point, the notice of dishonour was sufficient; no regular form of notice is necessary; it is sufficient if it import that the bill has been dishonoured, and that payment is expected from the party to whom the notice is given; *Bayley on Bills* (*j*), *Woodthorpe* v. *Lawes* (*k*). The word "returned," *ex vi termini*, imports the presentment and non-payment of the bill; *Grugeon* v. *Smith* (*l*), *Hedger* v. *Steavenson* (*m*), in which latter case, the authority of *Boulton* v. *Welch* was doubted; and the notice is stronger in this case, as the bill is spoken of as being *returned to the holder*: besides, coupling the subsequent conversation between the parties with this notice, there can be no doubt it was amply sufficient, *Hicks* v. *Duke of Beaufort* (*n*).

As to the third point, the effect of the "assignation" was merely to make *Souter* the assignee of any benefit derivable from the suit against *Crokat*; it contained no authority to release him, but on the contrary, to prosecute the suit against him.—[*Tindal*, C. J.—It certainly seems like a buying up of the action. As far as the document is intelligible to us, it looks as if the plaintiffs, having sued *Crokat*, had got hold of his property, or were likely to do so, and that *Souter*, a friend of his, paid the plaintiffs a sum of 106*l.*, in order to release him.]—It is entirely *res inter alios acta*.

(*d*) 7 Bing. 530; S. C. 5 M. & P. 475; 1 Tyr. 371; 1 C. & J. 417; 1 Bing. N. C. 194; 1 Sc. 1; 2 Clark & Fin. 93.

(*e*) 3 Bing. N. C. 688; S. C. 3 Hodg. 77; 4 Sc. 425.

(*f*) 3 Mo. & Sc. 164; S. C. 9 Bing. 723; and see *Schlenker* v. *Money*, 1 C. & P. 178.

(*g*) 6 C. & P. 728; S. C. not S. P. 1 Ga. 92; 2 C. M. & R. 103.

(*h*) See also *Marston* v. *Downes*, 6 C. & P. 381; 3 N. & M. 861; 1 A. & E. 31; where in an action by *A.* against *B.* (a mortgagor,) it was held that the defendant could not object to the production of the title-deeds of *C.* (the mortgagee), and that if *C.* or his attorney refused to produce them, the defendant could not object to the reception of parol evidence of their contents.

(*i*) 8 C. & P. 110.

(*j*) Pp. 256, 7, 5th ed.

(*k*) 2 M. & W. 109; S. C. 2 Gale, 193.

(*l*) 2 N. & P. 303; S. C. 1 Will. Woll. & Dav. 516; 6 A. & E. 499.

(*m*) 2 M. & W. 799, (see *per Parke*, B. *Ib.* 806); S. C. 1 Mur. & Hurls. 178; (181) 5 D. P. C. 771.

(*n*) 4 Bing. N. C. 229; *Ante*, 55.

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Humfrey, in support of the rule, insisted upon the arguments upon which the rule had been obtained; and with regard to the notice of dishonour, he further contended, that the subsequent conversation between the parties did not dispense with proof of regular notice, for it did not amount to an express promise to pay the bill; *Pickin* v. *Graham* (*o*), *Baker* v. *Birch* (*p*), *Borradaile* v. *Lowe* (*q*).

TINDAL, C. J.—This is an action brought on two bills of exchange; one for 100*l.*, the other for 850*l.*, upon each of which *Cauty*, the defendant, stands in the character of indorser; the bills having been refused payment when they became due, and the action being brought against *Cauty* in that character. Perhaps it would be more convenient to consider the case with reference to the larger one, that of 850*l.*, in the first instance, for as to that, the principal part of the argument has taken place.

In answer to this demand, the defendant pleads, (confining our attention to those pleas upon which the argument has arisen); *first*, that there was no notice of dishonour: *secondly*, that in consideration that divers persons, whose names are unknown, had accepted and received 2*s.* 6*d.* in the pound, on their respective debts, in full satisfaction and discharge thereof; the plaintiffs accepted and received the like sum of 2*s* 3*d.* on their debt, without the knowledge and consent of the defendant, and thereby the plaintiffs released the defendant. The verdict passed against the defendant on both these pleas; and the question now is, whether that verdict is proper. With respect to the first of these pleas, that there was no notice of the dishonour of the bill, upon the authority of two cases, *Grugeon* v. *Smith*, and *Hedger* v. *Steavenson*, (both of which have been decided since the decision in this Court, in *Boulton* v. *Welch*;) we have been urged to say, that the judgment which this Court gave in the case of *Boulton* v. *Welch* is, if not an improper judgment, one from which the Court ought now to withdraw their opinion, or at all events that the present case may be distinguished from that. I see no reason at present to hold that the judgment given by this Court in the case of *Boulton* v. *Welch* is not law It certainly has gone to the very fullest extent of the case of *Solarte* v. *Palmer*, but I do not think it has exceeded it. At the same time, I for one shall never be unwilling or ashamed to retract any opinion I may have formed, if, upon further consideration, I am satisfied that I have been wrong. I do not think however, that we are called upon either by the case of *Hedger* v. *Steavenson*, or that of *Grugeon* v. *Smith*, to reconsider the opinion we came to in *Boulton* v. *Welch*, for undoubtedly in both those two cases, there are circumstances found which do not exist in *Boulton* v. *Welch*; namely, that in the notice given respectively of the dishonour of the bill, the word "charges" in one, and a charge for "noting" in the other (*r*), formed part

(*o*) 1 C. & M. 725; S. C. 3 Tyr. 923.

(*p*) 3 Camp. 107.

(*q*) 4 Taunt. 93.

(*r*) In *Grugeon* v. *Smith*, the notice was a printed form, as follows: "*Commercial Bank of England, Manchester.*"

"Sir,

"Bill, £ — due —— on —— drawn by —— is this day returned —— with charges —— to which your immediate attention is requested.

"I am, Sir,

"Your obedient servant,

"————

"Manager."

The blanks being properly filled up.

of the notice; thereby conveying to the party, who should be informed of it, that the bill must have been *presented*. However, I am far from saying, that the case of *Boulton* v. *Welch* is one that I have any kind of inclination to extend beyond the strictest letter of it; but at the same time I must add, as at present advised, I am not inclined to re-consider it; as I do not think it departs from the principle of law, laid down in the case of *Solarte* v. *Palmer*, in the *House of Lords*.

It appears to me however, in the present case, coupling the written notice with the conversation that took place between the parties on the same day, there is no necessity for holding the party had not due notice of the dishonour of the bill. The letter which was intended to convey the notice of dishonour, was no more than this, "we are surprised," say the plaintiffs, (after adverting to a former bill which it is not necessary now to bring under consideration) "we are surprised that Mrs. *Gib's* bill was returned to the holder unpaid." Stopping there, the notice would certainly come very close to the case of *Boulton* v. *Welch*: but it appears that the very same day, the defendant with this notice in his hand, which he had received from the plaintiffs, calls on them at their country house, and while he is talking about the bill, he says, "I am very much surprised the bill has not been paid, I will write to the parties in *Edinburgh*, and see it paid." Now observe the parties are both together at the same moment, and discussing the subject of the notice. A word from the defendant, shewing any dissatisfaction with what had taken place at *Edinburgh*, would immediately have called forth from the other side a full explanation of all the circumstances; and if we were not to hold this to be an effectual notice, we should allow one party to lull another into a fatal security to his own interests, as to a subject on which the merest statement of any dissatisfaction, or the slightest intimation of it would have been sufficient to put him on his guard. This however having been before the jury, they held that notice was given, and I for one am not inclined to disturb the decision to which they have arrived. The second plea then, as to the 850*l.* bill, is that a transaction took place in *Scotland*, amounting to a discharge of the indorser of the bill: it is put on the ground of a general composition to the creditors, stating that the other creditors of the party had also accepted the same sum. No evidence whatever was given to support the plea in that shape. But it is said, if we look at the instrument produced, we cannot but say it must operate in law as a release of *W. Crokat* by the plaintiffs, and if the defendant was taken by surprise, it would be hard on him not to allow him to amend his plea: and undoubtedly, if I had seen clearly that this did amount to a release, I should have thought there was much in that argument. But looking to the effect of the deed, I do not think that is the necessary construction of it, nor indeed is it compatible with the deed itself, that it should have the construction contended for. For it appears that one *David Robinson Souter*, had paid 116*l.* 13*s.* 5*d.* to the mandatory of the plaintiffs; in consideration of which the plaintiffs "constitute and

In *Hedger* v. *Steavenson*, the notice was,—

"Sir,

"I am desired by Mr. *Hedger* to give you notice that a promissory for 99*l.* 18*s.* payable to your order two months after the date thereof, became due yesterday, and has been returned me unpaid; and I have to request you will please remit the amount thereof, with 1*s.* 6*d.* noting, free of postage, by return of post.

"I am, &c."

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appoint the said *D. R. Souter* and his heirs to their lawful cessioners, and assignees in and to the foresaid principal sum of 850*l.* sterling, contained in, and due by the bill above narrated, and the whole interest due and to become due thereon;" and the instrument then empowers him to go on and claim the sum due to the plaintiffs, as the indorsers of the bill. What *Souter's* character is, we do not know; he may have been a person who has purchased the plaintiffs' debt, or a third person who is named only as an instrument for the benefit of *William Crokat*: that does not appear to us upon the face of the instrument. It goes on to declare, that all further proceedings under that diligence against the trustees, or against *William Crokat*, shall always be at the expence of *Souter*; what is this but shewing that the right of action as between them and *William Crokat*, was not released by this instrument, but that they had put *Souter*, the person to whom it was assigned, in their place? We do not therefore see that the second point as to the 850*l.*, has been at all made out, so as to appear a valid discharge of *Crokat* by the plaintiffs.

As to the first bill, there is certainly a most important question of evidence involved in the point raised, and one that I should be unwilling to decide without a further investigation of the matter. I allude to the question of supplying, by secondary evidence, an instrument which an attorney refuses to produce. I am disposed however, to let the case go back on the first count, unless the plaintiffs, as has been intimated, are willing to give up the 100*l.* bill.

[The counsel for the plaintiffs repeated their intention of so doing.]

BOSANQUET, J.—Being obliged to attend at another place, I shall do no more than say that I fully concur in the view which has been taken of the case by my Lord Chief Justice.

PARK, J.—I am of the same opinion with regard to the notice of dishonour of the latter bill for 850*l.*, there is no doubt the cases upon that subject have gone to the extreme verge. As to the case of *Solarte* v. *Palmer*, in the *House of Lords*, I do not think we are at liberty, nor are we called upon to give any opinion, whether any case should be carried further than that; because I think this case may be fairly decided, as far as the notice of dishonour goes, on the parol evidence given in addition to the written notice. That parol evidence was of a conversation which took place on the very day the notice was received by the defendant; "I am surprised the bill is not paid, I will write to the parties at *Edinburgh*, and see it paid." That brings it within the cases where it has been held, that a promise to pay relieves the plaintiff from the necessity of proving presentment and notice. It has been argued, as though the promise in such a case must be an express one; *Pickin* v. *Graham*, and *Baker* v. *Birch* were referred to in support of that view, but they do not at all go the length of that doctrine; for in neither of those cases had the time arrived when *laches* had taken place; I admit that in *Pickin* v. *Graham*, the *laches* had *actually* taken place, but at such a distance from where the notice was to be given, that by no possibility when the promise was made, could the parties know of the dishonour; and Mr. Baron *Vaughan*, in giving his opinion in that case, says, "the conversation took place before the dishonour could be known." And therefore it shews, he considered that as an essential point. So it was also in *Baker* v. *Birch*.

These cases therefore, establish that *laches* must be known to a party before his promise can be evidence against him; the case of *Blesard* v. *Hirst* (*s*), decides that a knowledge of the default is necessary. The case of *Lundie* v. *Robertson* (*t*), is an authority to shew that if an indorsee expressly promises to pay the bill, it is to be *presumed* that he had received notice of its dishonour; but such presumption might be rebutted. With respect to the other point, as to the alleged indulgence to *Crokat*, I am of opinion that the instrument produced does not support the plea. It seems to me, the effect of it was accurately stated by my brother *Wilde*, that it was really nothing more than this, that proceedings having been commenced by the plaintiff in *Scotland*, (and what they do *Scotland* we are not acquainted with in *England*) attaching property of *Crokat's* in the hands of other persons, (an "arrestment," as they call it) for a claim of 850*l.*, a man of the name of *Souter*, (who does not appear to be a trustee for any other parties,) chooses to speculate and to give 116*l.* to the plaintiffs, if they would assign to him the chance of recovering against the estate of *Crokat*. I am of opinion, that so far from releasing, it continues the liability of *Crokat* under it.

As to the first bill, the counsel for the plaintiff having agreed to relinquish any claim upon it, it is unnecessary to say anything about it: I would not say a word more, but for this reason, that I do not at present quite agree with the opinion of Mr. Baron *Parke*, in the case of *Mills* v. *Oddy*, but I do not know that I should not be of his opinion, if I came to consider the case more fully. I should be sorry in this hasty motion, to state that his opinion ought to be reconsidered; for my learned brother's opinion must always have full weight with all the other judges of *Westminster Hall*; but as at present advised, I do not wish to be considered as agreeing with that case.

COLTMAN, J.—The question in this case is, whether the verdict is or is not right; that depends, first, on the question whether there was or was not sufficient notice of dishonour, and it appears to me that there was. It may be very true, that the written notice in itself would be not sufficient, but when the parties afterwards meet upon the same day, and whilst there is still time to give a fresh written notice, and the defendant then agrees (as upon the finding of the jury, he must be taken to agree,) that the note should be paid, I think it would be highly injurious if the plaintiffs were to be lulled into security, and then not have the benefit of a good notice. Suppose the defendant had in express terms at that time agreed to dispense with any notice, can any doubt exist that such an agreement would be valid? Then when he agrees to see it paid, that in substance seems to come to the same point. The cases that have been cited of *Pickin* v. *Graham*, and *Baker* v. *Birch*, are perfectly distinguishable from the present case, upon the ground, that at the time the promises were made in these cases, it must have been wholly unknown, whether the holder of the bill would ever be in a situation to call on the other party, who made the promise. Therefore, that is a situation of the parties which is totally different from the present. The case of *Borradaile* v. *Lowe*, is also distinguishable, for at the time of the conversation there, the party had actually been discharged by the *laches*, in not giving notice; therefore, we are free and unfettered by the cases on the subject, and

(*s*) 5 Burr. 2670 (*t*) 7 Ea. 231.

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it seems to me to be reason, common sense, and justice, under the circumstance of this case, to hold, there was a valid notice; the jury were very strongly of that opinion, and I conceive they were judges of the effect of that conversation; for though of the written evidence they were not the judges, they were the proper judges of what was the effect of that conversation. As to the effect of the deed of "assignation," I concur with what has been said by the rest of the Court, and am of opinion, that no new trial should be granted.

Rule discharged (the plaintiff entering a *nolle prosequi* as to the first count).

April 26.

HEATH *v.* ELLIOTT.

In order to constitute common *per cause de vicinage*, the adjoining lands must both be commonable.

In replevin for taking cattle from an open common called *Houghton Down*, the defendant avowed that the *locus in quo* was his leasehold property, and that cattle had been taken there damage *feasant*; the plaintiff pleaded, that the *locus in quo* adjoined another common called *Bury Hill Down*, and that a right of common *per cause de vicinage* existed between the adjoining Downs, upon which issue was taken: *Held*, that this issue involved the question, whether both the downs were commonable.

REPLEVIN for sheep taken from an open common or down called *Houghton Down*, county *Sussex*. *Avowry*, that at the time when, &c., the *Duke of Norfolk* was seised in fee of the *locus in quo*, and had demised the same to the defendant, who was lawfully possessed, &c.; and that he distrained the cattle *damage feasant*.

Plea in bar, that the *locus in quo* at the time when, &c., and from time immemorial, hath lain, and still doth lie, contiguous and next adjoining to a certain other common or down in the said county of *Sussex*, called *Bury Hill Down*, and hath never been separated or divided from the last-mentioned common or down by any enclosure, hedge, or fence whatever, sufficient to prevent cattle from time to time feeding and depasturing on the said common or down called *Bury Hill Down*, from erring and escaping therefrom into the common of *Houghton Down*, in which, &c.; and that the said cattle from time to time, during all that time put on the common called *Bury Hill Down*, to feed on the grass, &c., have, from time immemorial, gone, escaped and rambled, and have been used and accustomed to go, &c., therefrom into the said common called *Houghton Down*, in which, &c.; and to intermix there and feed with cattle feeding upon the last-mentioned down; and in like manner, the cattle feeding upon *Houghton Down*, in which, &c., from time immemorial have gone, &c., and have been used and accustomed to go, &c., therefrom into *Bury Hill Down*, and intermix, and there feed with cattle from time to time feeding on the last-mentioned down: that plaintiff was and still is possessed of a certain messuage, in the parish of *Bury*, &c., and has been used to have, and of right ought to have, common of pasture upon *Bury Hill Down* for his sheep, *levant* and *couchant*, &c.; and the plaintiff did put his commonable cattle upon the said *Bury Hill Down*; and the said *Houghton Down*, in which, &c., so being and lying contiguous thereto, not separated or divided therefrom by any inclosure, hedge, or fence, the said cattle of him, the plaintiff, of their own accord, and without the knowledge or consent of the plaintiff, went, escaped, and rambled from out of *Bury Hill Down* into *Houghton Down*, in which, &c., and intermixed and fed with the cattle then and there feeding, without the knowledge of the plaintiff, and there necessarily and unavoidably did the damage, &c. *Verification.*

Replication, traversing the allegation that the respective cattle which fed upon one down had from time immemorial gone, escaped or rambled into the other down, and intermixed and fed with the cattle put thereon. *Issue* joined.

At the trial, before *Littledale*, J., at the last Summer assizes for *Sussex*, it was proved, that *Houghton Down* was the property of the *Duke of Norfolk*, and had been let to the defendant; it also appeared, that the cattle which strayed from *Bury Down* to *Houghton Down* were constantly driven back; upon this evidence the learned judge directed a verdict for the defendant, reserving leave to the plaintiff to move to set it aside.

Platt, Q. C., in *Michaelmas* Term last, obtained a rule *nisi* accordingly; he contended that this was a case of common *per cause de vicinage*, which might have been put an end to by one party inclosing against the other, but that the mere driving back the cattle would not have that effect; he cited *Co. Litt.* 122, a.; *Musgrave* v. *Cave* (*a*), *Smith* v. *How* (*b*), *Bromfield* v. *Kirby* (*c*); *Wells* v. *Pearcy* (*d*).

Thesiger, Q. C., (with whom was *W. H. Watson*), now shewed cause.—It is clear, from the authorities cited on the other side, that common *per cause de vicinage*, is only an excuse for a trespass; and the right, if it may so be called, can only exist, *ex vi termini*, where there are two neighbouring commons; now, it was proved in this case, that whenever the trespass was committed the cattle were driven back; and that both the lands in question were not commons, as *Houghton Down* was the private property of the *Duke of Norfolk*; its being described on the pleadings as "an open common or down," proved nothing; it was only a name; the place, in fact, being a field; there was therefore no mutuality in this case. He was stopped by the Court, who called upon

Platt, Q. C., and *Channell*, in support of the rule.—The issue does not deny the commonable nature of *Houghton Down*; it merely denies the intermixing and rambling of the cattle; the point of law raised on the other side is not disputed, but it is not open to argument on the present pleadings, for the defendant is estopped by his replication from disputing the commonable nature of *Houghton Down*; the issue might have been framed so as to raise the present question, but it is clearly not involved in this issue.

TINDAL, C. J.—It appears to me, that in trying the issue raised by these pleadings, the jury must have considered whether the cattle put on one common had a right to stray and ramble upon another common; and consequently, that if they find one of the Downs in question is not a common, there is an end of the question. I cannot consider, therefore, that the commonable right is not involved in the present issue.

The other judges concurred.

Rule discharged.

(*a*) Willes, 322.
(*b*) 4 Rep. 38, b; 1 Rol. Ab. 399, K. pl. 3
(*c*) 11 Mod. 72.
(*d*) 1 Bing. N. C. 556; S. C. 1 Scott, 426.

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April 26.

Ex parte BIRCH and another.

The Court allowed the certificate of a married woman's acknowledgment of a deed in foreign parts to be filed, the affidavit verifying the certificate not being signed, upon the production of an affidavit that such was the practice there.

WILDE, Serjt. applied to file the certificate of the acknowledgment of a deed by two married women, at *Hamburgh*; the affidavit verifying the certificate was verified by a notary public and the English consul, but not signed by the deponent; and it was stated that it was not the practice at *Hamburgh* that an affidavit should be signed.

The COURT granted the application, upon the condition that an affidavit should be produced, verifying the last-mentioned fact.

April 26.

MATSON and others *v.* COOK.

The plaintiffs having, as overseers and churchwardens, inclosed certain waste lands (under 1 & 2 W. 4, c. 42), brought trespass against the defendants for prostrating a fence thereon; he pleaded a right of common, which he failed to establish:—*Held*, that the possession of the plaintiffs was sufficient to entitle them to maintain the action, and therefore, that they were not called upon to prove the consent of the lord of the manor to the inclosure, as required by the statute.

TRESPASS for pulling down a fence.

Pleas:—First, not guilty. *Second*, traversing the plaintiff's property in the *locus in quo*. *Third*, a justification, upon the ground that the defendant had a right of common appurtenant to the *locus in quo*.

At the trial before Lord *Denman*, C. J., at the last Summer assizes for *Surrey*, it appeared that the plaintiffs were the overseers and churchwardens of the parish of *Battersea*, in that county; of which parish the defendant was an inhabitant: that the plaintiff had inclosed a portion of a waste or common, within the manor of *Latchmore*, in the said parish, for the purpose of employing the poor, and had enclosed the same (partly by the fence in question), pursuant to the 59 *G.* 3, c. 12 (*a*), and 1 & 2 *W.* 4, c. 42 (*b*). The defendant had prostrated this fence. The plaintiffs failed to prove the consent required by the latter Statute; and the defendant failed to establish the third plea. The plaintiffs had a verdict; to set aside which,

Platt, Q. C., had, last Term, obtained a rule *nisi*, upon the ground that the plaintiffs were bound to have shewn the consent required by the statute of *W.* 4, to enable them to maintain trespass; as it was like the case of the execution of a power, and that all the circumstances required by the Act must be strictly complied with; *R.* v. *Austrey* (*c*).

(*a*) Sec 12 enacts, that the churchwardens, &c., with the consent of the vestry, may take any land which shall belong to the parish, or hire other land, and may employ the poor in the cultivation thereof.

(*b*) Sec. 2 enacts, that the churchwardens, &c., may inclose from any waste or common land in the parish, *with the consent* in writing *of the lord of the manor, and the major part in value of the persons having right of common thereupon*, signified under their hands and seals, any part of such waste, &c., not exceeding fifty acres, and cultivate the same for the use of the parish, &c.

(*c*) E. T. 1817, 1 Star. Ev. 322. See also *St. Michael's* v. *Tamworth*, (Burr. S. C. 770); *R.* v. *Margam*, (1 T. R. 775); *R.* v. *Clifton*, (2 Ea. 168); *R.* v *St. Margaret's, Leicester*, (8 Ea. 332); *R.* v. *Marsh*, (2 Har. & Wol. 255; 6 N. & M. 668).

Thesiger, Q. C., now shewed cause.—He argued that the defendant, having failed in his third plea, was a mere wrong doer; and therefore, the mere possession of the plaintiffs was insufficient as against him.

Platt, in support of the rule, relied upon the arguments he had urged in obtaining it.

TINDAL, C. J.—The plaintiffs are in possession of the land; the defendant, as against them, appears a mere stranger, and he has no right to call upon them to prove their title; their possession is sufficient to enable them to maintain this action

Rule discharged.

HOCKEN *v.* BROWN and another.

April 27.

TRESPASS for taking and carrying away goods. *Plea*, justifying under a judgment against the plaintiff and one *C. V. G.*, for 1,200*l.* and a *fieri facias*. *Replication*, that the defendants had contracted with *C. V. G.* for the purchase of an annuity of 135*l.* 15*s.* for the price of 1,200*l.*, and that it was agreed it should be further secured by the joint and several warrant of attorney of the plaintiff and *C. V. G.*; that the annuity was granted by *C. V. G.*, payable quarterly, and that *C. V. G.*, and the plaintiff as such surety, executed such warrant of attorney; and that it was further agreed that the judgment, when confessed and entered thereon, should stand and be considered, as a collateral security for the payment of the said annuity: that the judgment was accordingly entered up, and was the same mentioned in the plea, and that the *fi. fa.* also mentioned in the plea, was sued out thereon. That after the judgment and before the committing of the grievance, &c., a sum of money for one of the quarterly payments of the annuity became due, for the payment whereof the plaintiff, as such surety, was liable; but that, after the judgment, and before the instalment became due and payable, *C. V. G.* was a prisoner within the meaning of the Insolvent Debtors' Act (*a*), and petitioned for his discharge, and was discharged by the Insolvent Debtors' Court under that Act; whereby, and by force of such discharge, the plaintiff then became and was released and discharged from all liability to the defendants in respect of the said annuity, and from all payments thereof to be made by him, &c. *Special demurrer.*

The surety of a grantor of an annuity is not discharged by the discharge of the latter under the Insolvent Act.

Channell, in support of the demurrer. Although, where a party, by his own act, discharges one of two joint-debtors, or the principal debtor, this operates as a release to the other joint-debtor or to the surety, as the case may be, this rule does not apply where the party is discharged by an Act of Parliament, unless the Act itself provides that the discharge shall have such effect: in the 51st section of the Act in question, there is no such provision, but rather the contrary (*b*). The effect of that Section is, that the grantor

(*a*) 7 G. 4, c. 57.

(*b*) S. 51, enacts, "That the discharge of any prisoner shall extend to any sum which shall be payable *by way of annuity*, or otherwise, at any future time, by virtue of any bond,

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of an annuity is discharged from his liability in respect of any future payments of such annuity, and the creditor is to have the same benefit as other creditors; but it is expressly provided that it is to be "without prejudice to the respective securities of such creditor." The meaning of these words was expounded in *Cowley* v. *Bussell* (*c*), which was decided upon the 51st *G.* 3, c. 125 (the Insolvent Act then in operation), which contained words precisely the same as those contained in the present Act (*d*). *Mansfield*, C. J., there said, "the words '*without prejudice to their respective securities*' are very obscure, but they may mean, that if a man has any specific security on land, it should not be taken from him, *or if he has sureties, that they should not be discharged;* that only the person and property of the debtor are to be discharged in this case, in like manner as the person and property of the debtor only are discharged under a commission of bankruptcy." In *Page* v. *Bussell* (*e*) it was held, that a person discharged under the same Act was liable to his surety for the arrears of an annuity due since his discharge, which the surety had been obliged to pay; and *Powell* v. *Eason* (*f*), which was decided upon the present Insolvent Act, is to the same effect, and the difference is there pointed out between the Insolvent and Bankrupt Acts (*g*).

covenant, or other securities, of any nature whatsoever; and that every person who would be a creditor of such prisoner for such sum of money, if the same were presently due, shall be admissible as a creditor of such prisoner for the value of such sum so payable as aforesaid, which value the said Court shall, upon application at any time made in that behalf, ascertain; regard being had to the original price given for such sum, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof, to the time of filing such prisoner's petition; and such creditor shall be entitled in respect of such value, to the benefit of all the provisions made for creditors by this Act, *without prejudice nevertheless to the respective securities of such creditor*, excepting as respects such prisoner's discharge under this Act."

(*c*) 4 Taunt. 460.

(*d*) By sec. 16 of that Act, it is enacted, "That every creditor of any debtor who shall be discharged by virtue of that Act, for any sum of money, payable by way of annuity or otherwise at any future time by virtue of any bond, covenants, or other securities of any nature whatsoever, shall be entitled to be admitted a creditor, and shall be entitled to receive a dividend of the estate of such debtor, in such manner and upon such terms and conditions as such creditor would have been entitled unto *by the laws now in force, if such debtor had become bankrupt, and without prejudice* in future *to their respective securities*, otherwise than as the same would have been affected by a proof made in respect thereof by the creditor under a commission of bankrupt, and a certificate obtained by the bankrupt under such commission." By sec. 71 of 49 G. 3, c. 121 (one of the Bankrupt Acts then in operation), it was enacted, that "It shall be competent to any annuity creditor of any person against whom a commission of bankrupt shall issue, whether the same shall be secured by bond or covenant, or by whatever assurance the same shall be secured, and whether there shall or shall not be, or have been, any arrear of such annuity at or before the time of the bankruptcy, to prove under such commission as a creditor for the value of such annuity, which value the commissioners shall have power to ascertain; and the certificate of every bankrupt under whose commission such proof shall be or might have been made, shall be a discharge of such bankrupt against all demands whatever in respect of such annuity, and the arrear and future payments thereof, in the same manner as such certificate would discharge the bankrupt with respect to any other debt proved, or which might have been proved, under the commission."

(*e*) 2 M. & S. 551.

(*f*) 8 Bing. 23; 1 Mo. & S. 68.

(*g*) By sec. 54 of 6 G. 4, c. 16 (the present Bankrupt Act), annuity creditors are admitted, "whether there were or not any arrears of such annuity due at the bankruptcy;" by sec. 55, it is enacted, "that it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any

Hoggins, contrà.—This is the first question upon an annuity that has arisen under the present Insolvent Act; and the intentions of that Act would be defeated if the surety were held not to be discharged by the discharge of the principal under the Act; as in that case, the latter, instead of being released, would still be liable to a circuity of action to his surety after *he* had been compelled to pay. The cases cited do not apply; *Cowley* v. *Bussell*, and *Page* v. *Bussell*, were decisions upon other Acts of Parliament; and *Powell* v. *Eason* was decided upon the 10th and 46th Sections of the present Act, and not on the 51st, which is in question in the present case. The object of the legislature was, to place the surety of a bankrupt and an insolvent upon the same footing.—[*Bosanquet*, J.—The surety of a bankrupt is still liable to pay 20*s.* in the pound to a creditor; your argument goes to show, that the surety of an insolvent is not liable at all. What is the object of having a surety, but to guard against the insolvency of the principal debtor?]—If the principal is discharged from his liability, so is the surety; and the object of the Insolvent Act was to discharge the insolvent at all events.—[*Coltman*, J.—It would certainly be very strange that an insolvent's surety should be in a better situation than the creditor.]—The Insolvent Act was probably intended to have another clause, similar to the 55th of the Bankrupt Act, which was framed before the Insolvent Act.—[*Bosanquet*, J.—It would rather seem, therefore, that the section was omitted from the latter Act, *de industriâ*.—*Tindal*, C. J.—According to your argument, an annuity creditor, without a surety, would stand as well as one with a surety.]—It never can have been intended that a discharged insolvent should be in a worse situation than a certificated bankrupt. In both cases, the legislature meant to compel the surety to stand in the situation of the creditor.

TINDAL, C. J.—It appears to me, that this case must be decided by the concluding paragraph of the 51st Section of the Insolvent Act, which, after discharging the debtor from annuity debts, and allowing the annuity creditor to be admissible, as if the debt were presently due, states that "such creditor shall be entitled, in respect of such value (of the annuity), to the benefit of all the provisions made for creditors by this Act, *without prejudice* nevertheless *to the respective securities* of such creditor, excepting as respects such prisoner's discharge under this Act." If the creditor does not think proper to avail himself of the provisions of this Section, he may have lost his remedy against the principal debtor; but the question is, whether he has lost it

person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity and for the payment thereof; and if such surety after such proof, pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due), pay the sum so proved as aforesaid, he may be *said (sued?)* for the accruing payments of such annuity until such annuitant shall have *(been?)* paid or satisfied the amount so proved, with interest, &c.; and after such payment or satisfaction, such surety shall stand in the place of such annuitant in respect of such proof as aforesaid by such surety; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety in respect of such annuity; provided that such surety shall be entitled to credit in account with such annuitant for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid."

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against the surety. In the present case the plaintiff makes himself a surety for the grantor of the annuity, by giving the security of his own warrant of attorney; but he now objects to that being put in suit against him, on the ground that the principal has been discharged under the Insolvent Act. I am of opinion, however, that this case comes within the exception mentioned in the Act, which appears to me to reserve to a creditor the power of pursuing his securities, provided his doing so do not prevent or interfere with the discharge of the prisoner. It is urged as an argument, on the part of the plaintiff, that if he is not discharged by the discharge of his principal under the Act, and is compelled to pay the arrears of the annuity as they arise, it will be competent to him to recover from the insolvent the money so paid by the plaintiff; and therefore, that the insolvent would not, in fact, be discharged from his liability to pay the annuity. Prossibly this may be so. It was the case under the old bankrupt law (*h*); the new Bankrupt Act, however, has provided for such a case, but the Insolvent Act has not; the machinery, therefore, is wanting, by which the surety of an insolvent can relieve himself from his liability, and we are not in a situation to supply it. I am of opinion, therefore, that there must be judgment for the defendant.

PARK, J.—I am of the same opinion. This very point has been often under the consideration of the Courts under the old bankrupt law, to which the present Insolvent Act is similar. In the case of *Freeman* v. *Burgess* (*i*), the Court refused to liberate, on motion, a discharged insolvent, who had been arrested by his surety for the arrears of an annuity accruing subsequently to the insolvent's discharge, and paid by the surety. If that case stood alone, perhaps it might not be of much authority in the present instance; but on that occasion, the grounds of the law were fully gone into, and they have always been acted upon in all courts of justice. It has been urged, on the part of the plaintiff, as a hardship that the principal debtor, after having been discharged under the Insolvent Act, should still remain circuitously liable for the original debt; it may be hard, but, as the law stands, we have no power to apply any remedy. It has also been argued, that there must have been an omission in this Act of Parliament; supposing that were the case, I cannot see how we could supply the deficiency; but it appears to me, from the wording of the last part of the 51st Section, that there is no such omission; nor can I perceive how those words "without prejudice nevertheless to the respective securities of such creditors," are to be got over. The very object of taking a surety, is in order to have a remedy in case the principal should fail.

BOSANQUET, J.—I am of the same opinion. As soon as an annuity is in arrear from the grantor, if there be a surety, the creditor at once acquires a vested right to sue such surety; it is contended, however, that if the grantor is discharged from his liability by operation of the Insolvent Act, that the surety also is discharged; but I think that nothing short of the express words

(*h*) See *Osborn* v. *Churchman*, Cro. Jac. 127; *Welsh* v. *Welsh*, 4 M. & S. 333; 1 Ar. B. L. 95; *Martin* v. *Brecknell*, 2 M. & S. 39; *Ex parte Hughes*, 5 B. & A. 482; *Soutten* v. *Soutten*, *Ib.* 852; *Meade* v. *Braham*, 3 M. & S. 91, *Watkins* v. *Flanagan*, 3 B. & A. 186, S. C. in error, 1 Bing. 413.

(*i*) 4 Bing. 416.

of an Act of Parliament, will deprive the creditor of the right so vested in him. Now, it is observable that the year before the present Insolvent Act was passed, the present Bankrupt Act came into operation. In the Bankrupt Act there are provisions for an annuity creditor very different from those in the Insolvent Act. [His Lordship read the 55th sec. of 6 G. 4, c. 16, and the 51st sec. of 7 G. 4, c. 57.] In the latter there is a provision that the annuity creditor may prove, but there is no provision for the discharge of the surety; but in either case the surety is bound to pay. The argument of the plaintiff is, that under the Insolvent Act, the surety is wholly relieved from his liability; if that were so, in most cases there would be very little use in taking a surety. I think, therefore, we should not be justified in saying that the creditor has no action against the surety; but I see nothing in the new Insolvent Act to support that view.

COLTMAN, J.—If we were at liberty to speculate on the probabilities of the case, I should be inclined to think that there was an omission in this Act, one of those

—— quas aut incuria fudit
Aut humana parum cavit natura;

but I think we cannot indulge in these considerations; we must take the Act as we find it. I am not insensible to the argument, as to the circuitous method of recovering the annuity from the insolvent, whereby he loses the benefit which the legislature appeared to intend for him; but the opposite inconvenience appears to me to be much greater; namely, that the surety of an insolvent would be in an infinitely better situation than the surety of a bankrupt, and I could not come to that conclusion unless I felt it was fully borne out by the Act of Parliament.

Judgment for the defendant (*j*).

(*j*) See *Wilmer* v. *White*, 6 Bing. 291.

MALINS *v.* FREEMAN.

April 27.

By Stat. 17 G. 3, c. 50, s. 8, a vendor who sells by auction, may make it a condition of sale, that the purchaser shall pay the auction duty, and that, in case of his refusal to do so, his bidding "shall be null and void to all intents and purposes."—*Held*, that a bidding is *not absolutely void* by the refusal of a purchaser to comply with such a condition of sale, but *voidable only at the option of the vendor*; and that the purchaser cannot insist upon such refusal to avoid the contract.

THE first count of the *declaration* stated, that whereas the plaintiff heretofore, &c., to wit, on the 8th of *May*, 1834, caused to be put up for sale by public auction, a certain plot of land and premises, situated, &c., subject to the following, amongst other conditions of sale: "That the purchaser should pay down immediately a deposit of 20*l. per cent.* in part of the purchase-money, together with a moiety of the excise duty of 7*d.* in the pound, and sign an agreement for payment of the remainder of the purchase-money, with the amount of the timber, fixtures, &c., on or before the 31st of August, 1834," &c. (*a*); that the defendant, upon such putting up of the said premises at the said sale was the highest bidder, and was so declared to be, and then became and was the purchaser of the said premises, at and for a certain

(*a*) Other conditions of sale were stated, which, however, were immaterial to the question under discussion.

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sum of money, to wit, &c., subject to the said conditions. Averment, of mutual promises to perform the said conditions, and that the plaintiff was ready to perform the conditions on his part as vendor, but that the defendant did not nor would perform any of the conditions on his part as purchaser, &c.

Fourth plea, That it was a condition of the said contract of sale in the said first count mentioned, that a moiety of the excise duty or pound rate, granted by the statutes in that case made and provided, should be paid by the purchaser over and above the price bidden at such sale by auction; and the defendant further says, that the said moiety of the said excise duty or pound rate aforesaid was not, nor was any part thereof paid by him at the time of the said sale, although payment thereof was then demanded by the auctioneer of the defendant, or at any time since, but the same remains wholly due and unpaid on his, the defendant's, part; and to pay the same or any part thereof the defendant hath wholly neglected and refused, and still doth neglect and refuse, contrary to the statute in that case made and provided; whereby and by force of the said statute, the said bidding and sale became and were, and still are, wholly void. *Verification.*

Special demurrer.—That the fourth plea does not traverse, or confess and avoid any matter stated in the declaration; that all matters stated in the plea, except the fact that payment of a moiety of the excise duty was demanded by the auctioneer of the defendant, which is wholly immaterial, are stated by the plaintiff in his declaration; and therefore the said plea is a mere repetition of parts of the declaration, and is insufficient; also the said plea is bad, as pleading only a supposed inference of law, and cannot lead to, or produce or raise, an issue upon any material fact in dispute, triable by the country, &c. *Joinder.*

R. V. Richards was to have argued in support of the demurrer, but the Court called on

W. H. Watson, in support of the plea.—By 17 *G.* 3, c. 50, sec. 8 (*b*), the vendor is entitled to make it a condition of sale, that the buyer shall pay a portion of the excise duty, and that if he refuse to do so, his bidding is to be "null and void to all intents and purposes;" if, therefore, the buyer has so refused, there is no contract of sale upon which the vendor can sue. In *Sugden on Vendors and Purchasers* (*c*), the author, commenting upon this Section, observes, "This provision seems very objectionable. It might be contended, that if a purchaser disliked his bargain, his refusal to pay the auction duty would cancel the sale, and throw the whole expence attending it on the vendor, whose estate would still remain unsold. If there be any foundation for this argument, the clause in question ought not to remain in

(*b*) Which provides, "that nothing herein contained shall extend to restrain any seller by auction, or person acting as auctioneer at any sales by way of auction, from making it a condition of sale, that the pound rate granted by this Act, or any certain portion thereof, shall be paid by the purchaser, over and above the price bidden at such sale by auction; and in such case the person so acting as auctioneer, is hereby authorized and required to demand payment of the said duty from such purchaser, or such portion thereof as expressed in such condition or agreement; and upon neglect or refusal to pay the same, *such bidding (?) shall be null and void, to all intents and purposes.*"

(*c*) P. 44, n. 9th ed.

its present shape." In *Phillips* v. *Bistolli* (*d*), it was held to be a question of fact for the jury, whether a chattel sold at an auction had been accepted by the purchaser, so as to satisfy the Statute of Frauds; and one point that was strongly urged in that case, to shew there had been no acceptance was, that by the conditions of sale, the purchaser was to pay 20*l.* per cent. upon the purchase-money, and that, in default of such payment, there could have been no valid delivery of the chattel, and consequently, no acceptance. The present is not like the case of a contract, to be made void by some matter arising subsequently, such as the case of a proviso for re-entry upon breach of covenants in a lease, (where the party breaking the covenant could not set up the nullity of the lease; *Doe*, dem. *Bryan* v. *Bancks* (*e*); for here the *contract* is to be null and void on the refusal of the purchaser to do a certain act which was necessary for its completion: stronger words could not have been used than those adopted by the Legislature on this occasion; and though it may be admitted that on some occasions the words used in this Act may be construed to mean "voidable" only, yet, as this is a Statute for the protection of the revenue, it ought to receive a strict interpretation.

TINDAL, C. J.—It appears to me, that the intention of the legislature to benefit the government, may be effected without destroying the contract between the seller and the purchaser; for I cannot concede that a party by his own voluntary act, is to have the power of nullifying a contract which he has previously entered into.

The Act of Parliament, after imposing a certain duty upon sales by auction, proceeds to state, that the seller may make it a condition of sale that the purchaser shall pay such duty or any portion thereof, and that if he refuses to do so, his bidding shall be null and void to all intents and purposes: now, I think this provision falls within the principle of the cases mentioned in 3 *Rep.* 59 b.: "On the Stat. of 1 *Eliz.* (*f*), which provides 'That all grants, leases, &c., made by bishops in other manner than is mentioned in the Act shall be *utterly void and of no effect to all intents and purposes.*' Notwithstanding these precise words, it was adjudged in the *Common Pleas* (*M.* 32, and 33 *Eliz.*) in a *quare impedit* between *Sale* and the *Bishop of Coventry and Lichfield*, that a grant of the next avoidance of an advowson, which is now warranted by the said Act, is not void as to the grantor himself, but as to the successor, for so was the intent of the Act to provide for the successor, and not for the party himself. So, and on the same reason was it resolved in the *Common Pleas, per totam Curiam* (*Pasch.* 39 *Eliz.*) between *Hunt* and *Singleton*, for a house in *Foster Lane*, in *London*, whereof the inheritance was in the Dean and Chapter of *Paul's*, That if the Dean and Chapter make a lease not warranted by the Statutes of 13 & 14 *Eliz.* (*g*), in which case it is provided by the said Acts, that such lease shall be absolutely void and of no effect to all intents and purposes; in this case of a corporation aggregate of many persons, which never dies, it was greatly doubted if the lease should not be utterly void presently, according to the express letter of the Act; but it was at last resolved, Forasmuch as the Act was made for

(*d*) 2 B. & C. 511; S. C. 3 D. & R. 822.
(*e*) 4 B. & A. 401.
(*f*) c. 19, s. 5.
(*g*) c. 10, s. 3.

the benefit of the successors, that the lease should not be void till after the death of the Dean who was party to the lease; and although the successor of the Dean is not successor to the whole corporation who made the lease, but only the principal members of it, yet, because the whole corporation never dies, such lease, by construction, shall be void after the death of the Dean who is the principal member of the corporation, and his successor with the Chapter shall avoid it."

Doe, dem. *Bryan* v. *Bancks*, is also applicable to this case; there a lease of coal mines reserved a royalty rent for every ton of coals raised, and contained a proviso that the lease should be *void, to all intents and purposes*, if the tenants should cease working at any time for two years. After the working had ceased more than two years, the lessor received rent; and was held that a tenancy from year to year was not thereby created; for the lease was *not absolutely void* by the cesser to work, but *voidable only at the option of the lessor*, and that he might avoid the lease upon the cesser to work commencing two years before the day of demise in the ejectment. So in the present case, I think the proper construction of the Act is, that the contract should be considered *voidable only at the option of the seller*, and that the buyer cannot set up his own neglect to defeat the contract; the plaintiff, therefore, must have judgment.

PARK, J.—of the same opinion.

BOSANQUET, J.—I am also of the same opinion. It was admitted in argument, that the words "null and void to all intents and purposes," may, in some instances, be construed to mean "voidable only;" and this is certainly a case in which that construction ought to prevail. The Act provides that the seller may compel the purchaser to pay the duty; but this is clearly intended for the benefit of the former; and the Courts would, I think, act contrary to the intention of the Legislature, if they were to turn this provision against him.

COLTMAN, J.—It is contrary to natural justice that a party, by his own default, should avoid his contract, and we would not put such a construction upon this Statute as would have that effect, unless we found ourselves constrained to do so. Language as strong as that adopted upon this occasion, has been used by the Legislature in several Statutes, and the Courts have uniformly given to them an equitable construction; for example, the Statute of Fines (*h*), enacts, that covinous recoveries suffered by tenants for life, shall, as against the reversioner or remainder-man, "be clearly and utterly void and of none effect;" yet this has always been construed to mean, that such recoveries, though void as against the reversioner or remainder-man, is good among the parties thereto (*i*).

Judgment for the plaintiff.

(*h*) 14 El. c. 8. See also 11 H. 7, c. 20; 32 H. 8, c. 36; 34 & 35 H. 8, c. 20.

(*i*) See Pig. Rec. 92—95; Salk. 571; 3 Bl. Com. 361.

ALSAGER and others, Assignees of DRURY, a Bankrupt, *v.* SPALDING and another.

Common Pleas.
April 28.

ASSUMPSIT for money had and received. *Plea*, the general issue.

It appeared at the trial, that *Drury*, in *December*, 1834, being embarrassed, and owing the defendants 99*l.* 17*s.*, and also 20*l.* upon a promissory note, proposed to enter into a composition to pay his creditors 8*s.* in the pound, by three instalments. The defendants had for some time previously held a policy of insurance for 300*l.* upon the life of *Drury's* mother, as a security for their debt. Two of his creditors refused to sign the composition, unless the defendants also signed, but they refused to do so, unless the policy were assigned to them; and thereupon *Drury* did so assign it, in consideration, (as was alleged in the assignment) of 40*l.* 4*s.* 6*d.*, which was the value set upon the policy by the insurance office. The defendants and the other creditors then signed the composition agreement, whereby they released *Drury* from their respective debts, and engaged to cancel all bills, notes, and securities held by them.

The defendants gave up the note for 20*l.* but retained the policy. In *September*, 1835, they paid 15*l.* 17*s.* 6*d.*, the annual premium on the policy. In *August*, 1836, *Drury's* mother died, and the defendants received 237*l.* 12*s.* 6*d.* on the policy. In *May*, 1837, *Drury* became bankrupt, and the plaintiffs, as his assignees, brought this action to recover 221*l.* 15*s.*, being the amount of the policy, *minus* the premium paid by the defendants. Only two instalments had been paid under the composition deed.

The plaintiffs obtained a verdict.

A. held a policy of insurance, as a security for a debt due from *B.*, and refused to join in a composition deed, unless the policy were assigned to him. Upon the policy being so assigned, *A.* executed the composition deed. The policy was paid to *A.*, but the full amount of the composition was not paid; *B.* became bankrupt: *Held*, that his assignees might recover the amount of the policy from *A.*

Talfourd, Serjt., in *Hilary* Term, obtained a rule *nisi* to set it aside, on the ground that the defendants were entitled, under the circumstances, to retain the policy, and that, by the nonpayment of the third instalment, *Drury's* creditors had been remitted to their original rights. He cited *Ward* v. *Bird* (*a*), and *Oughton* v. *Trotter* (*b*).

Wilde, Serjt., and *Knowles*, now shewed cause, and relied upon *Smith* v. *Cuff* (*c*), *Turner* v. *Hoole* (*d*), *Cockshott* v. *Bennett* (*e*), *Stock* v. *Mawson* (*f*), and *Smith* v. *Bromley* (*g*).

Talfourd, serjeant, admitted he could not distinguish these cases in principle from the present.

Per Curiam.

Rule discharged.

(*a*) 5 C. & P. 229.
(*b*) 2 N. & M. 71.
(*c*) 6 M. & S. 160.
(*d*) Dow. & Ry. N. P. C. 27.
(*e*) 2 T. R. 763.
(*f*) 1 B. & P. 286.
(*g*) 2 Doug. 696, n.

Common Pleas.

May 3.

A declaration contained two counts; the first, upon a bill of lading to carry goods from *D.* to the port of *L.*, and there deliver them to plaintiff; the second, upon a contract in consideration of further reward, to carry the same goods from a wharf at the port of *L.*, and to deliver them at the plaintiff's premises:—*Held*, no violation of R. H., 4 *W.* 4, (Pleading Rules, No. 5.)

JAMES *v.* BOURNE and others.

THIS action arose out of the same circumstances as those from which the case of *Gatliffe* v. *Bourne* (*a*), originated: the declaration was the same as in that case (*b*), *mutatis mutandis*; containing two counts, one upon a contract as upon a bill of lading to carry and deliver goods at the port of *London*; the second, upon a contract to take care of them at a wharf, and to carry them thence, and deliver them at the plaintiff's place of business.

An application had been made to *Park*, J., at chambers, to strike out one of these counts, as being in violation of *R. H.*, 4 *W.* 4 (*Pleading Rules*), No. 5 (*c*), but it had been refused.

Kelly, Q. C., however, upon a former day in this Term, obtained a rule *nisi* to that effect.

Stephen, serjeant, and *C. Crompton*, shewed cause.—They contended there was no apparent violation of the rule (*d*), as, for any thing that appeared to the contrary, there might, in fact, be two distinct contracts, though they both related to the same goods; if they had been damaged in their passage from the wharf to the plaintiff's premises, the plaintiff could not have recovered upon the first count. They relied upon *Thoroton* v. *Whitehead* (*e*), where the declaration containing one count for double rent, on 11 *G.* 2, c. 19, s. 18, and a second for use and occupation, the Court refused to strike out one of them; and *Guest* v. *Everest* (*f*), where, in *case* against the sheriff, it was held, there might be one count for not arresting, and another for an escape. Besides, this being a matter for the discretion of a judge at chambers, the defendant having failed in his application there, ought not to be encouraged to come afterwards to the Court, *Tadman* v. *Wood* (*g*).

Kelly, in support of the rule, admitted the question was, whether there was an apparent violation of the rule upon the face of the record; but he contended that, in judging of this, the Court must look at the record as lawyers, and they could not fail to see that both counts were founded on the same transaction, and that the same evidence would be applicable to both; he relied on *Jenkins* v. *Treloar* (*h*). The Court were not ousted of their jurisdiction by the fact of the question having been before a judge at chambers.

(*a*) Reported, *ante*, pp. 82, 120.

(*b*) See p. 120.

(*c*) "Several counts shall not be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each. * * Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed."

(*d*) By *R.* 6, "Where more than one count, &c., shall have been used, *in apparent violation* of the preceding rule,' an application may be made to a judge, to strike out such counts introduced in violation of the rule.

(*e*) 1 Tyr. & Gran. 316; S. C. 1 Gale, 359; 1 M. & W. 14; 4 D. P. C. 747.

(*f*) 9 Leg. Obs. 75, cit. Tidd's New Prac. 218.

(*g*) 4 A. & E. 1011.

(*h*) 1 Tyr. & Gran. 316; S. C. 1 Gale, 360; 1 M. & W. 16; 4 D. P. C. 690. See also *Cholmondeley* v. *Payne*, 3 Hodges, 80; 3 Bing. N. C. 708; 4 Sc. 418; 5 D. P. C. 638.

TINDAL, C. J.—This appears to me to be an application to the Court, not by way of appeal from the decision of a judge at chambers, but to the general jurisdiction we exercise, to see that no abuse is practised in the conduct of a suit. That general power is not taken away from us by the new rules, though undoubtedly, in the exercise of that power, we are bound by them. The question here is, whether the allowing these two counts to stand in the declaration, will be a violation of the 5th rule of *H.*, 4 *W.* 4; and, upon the best construction I am able to put upon that rule, I am of opinion that it will not. The rule forbids the allowance of several counts "founded on one and the same subject matter of complaint;" and undoubtedly, if these words were to be taken in the most general sense, the allowance of these two counts would appear to be in breach of that rule; because it is clear, that the subject matter of complaint in both counts, is the destruction of the plaintiff's goods by fire, and the consequent non-delivery of them to him. But the examples given with the rule in question, explain it, I think, to mean, that if on the face of the declaration, two or more counts relate apparently to separate and distinct contracts, they may be allowed to stand; for there is no reason to infer that there may not be such distinct contracts, though they may relate to the same goods. In the present case, the first count is upon a bill of lading, whereby the defendant undertakes to deliver the goods at *London* generally; the second count no doubt relates to the same goods, but it sets forth a totally separate contract, namely, an undertaking by the defendant to carry the goods from a certain wharf, and deliver them at the plaintiff's place of business, in *Ironmonger-lane*. Now, look at the examples explanatory of the rule; take, for instance, the first: "Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded upon the same subject matter of complaint, and are only variations in the statement of one and the same contract;" this shews that, in cases of contract, "the same subject matter of complaint," means "the same contract;" and it is clear that there may be one contract upon a bill of lading to carry goods to the port of *London*, and a further contract, arising out of the former, to carry them somewhere else, after they shall have arrived at the port; the defendants may be under different degrees of liability before the goods arrive at their ulterior destination. The second example is: "So counts for not giving, or delivering, or accepting, a bill of exchange, in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods, to be paid in money, are not to be allowed; so counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed," because, in both these cases, it is one and the same contract, varied only in description; "but counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject matters of complaint; *for the debt and security are different contracts;* and such counts are to be allowed."

And there will be no inconvenience to a defendant, by refusing a rule in cases like the present; for if the plaintiff fails in establishing both contracts, the defendant will have a verdict and costs upon one count.

I am of opinion, therefore, that this rule should be discharged, upon the ground that the two counts disclose substantially distinct subject matters of complaint.

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BOSANQUET, J.—This is an application to the general jurisdiction of the Court to strike out one of two counts in a declaration; and if those two counts have been inserted contrary to the New Rules of Pleading, the Court certainly ought to strike out one of them. The question is, if they are in *apparent violation* of the 5th rule, and I am of opinion that they are not; but that they are founded *apparently* upon different subject matters of complaint. It is said, that both counts are evidently founded on the same *transaction*, and, as far as that they both relate to the same goods, to be brought by the defendants to *London*, there is no doubt this is correct. I remember, when the new rules were framed, the word "*transaction*" was very much under consideration, but it was ultimately rejected, and the term "subject-matter of complaint" was selected instead, as being less likely to mislead. It is argued, that these two counts set forth only one contract differently described; if that were so, they would clearly fall within the rule, which I, for one, should not be prone to relax; but it appears to me they are founded on two different contracts, each requiring a different act to be done, and each founded upon a distinct consideration; the second count states, that "in consideration of a further reward," the defendants undertook to carry the goods from the wharf to the plaintiff's place of business, and unless the consideration alleged in that count be proved, the plaintiff must fail upon that count. I think, therefore, that the two counts are founded upon apparently distinct contracts, as the same thing may be a breach of various contracts or covenants. In *Jenkins* v. *Treloar*, the question whether the two counts were in apparent violation of the rule was much discussed, and it was decided, and, as I think, rightly, that they were, being both founded upon substantially the same matter of complaint, namely, a claim to the same fee or duty, described only in a different manner in each count.

COLTMAN, J.—I have not been able to bring my mind to any very satisfactory or definite view of this question; my learned brothers, however, have made up their minds, though I confess that, at present, I do not exactly grapple with their view of the case. I feel a doubt whether these two counts are not in apparent violation of the rule under consideration, as it does not appear to me clear, that distinct subject matters of complaint are intended to be brought forward under each count: if there are, it appears to me that the plaintiff would have run no risk by having the indorsement made upon the summons before the judge, as pointed out by rule 6 (*i*). The examples do not appear to me very easily to be reconciled with the rule. However, I think in this case, that justice will best be satisfied by discharging the rule.

PARK, J.—I have refrained from expressing my opinion till my brothers had stated theirs, because, although this is, in point of form, an original application to the Court, it is, in fact, an appeal from my decision at chambers,

(*i*) In the course of the argument, such a course had been suggested by the Court, but Serjeant *Stephen* pressed to have the rule discharged, as he observed that, in that case, the possible consequences to his client would be much less disadvantageous than by the course suggested; if the rule were discharged, and the plaintiff went to trial on both counts, and failed on one, he would lose the costs of that count only; in the other case, if the judge should certify, the plaintiff would not get the costs, even upon the issues upon which he succeeded. See *R.* 7.

under the new jurisdiction, which I may say, I have often found very distressing. The case was argued before me by counsel, and I then thought, and still think, that the two counts disclose two distinct grounds of action, although the subject matter of complaint may be the same as far as the non-delivery of the goods is concerned. If the damage to the goods had not happened at the wharf, but in their transit thence to the plaintiff's premises, could he have recovered upon the first count framed upon the bill of lading? No answer has been given to this argument.

Rule discharged.

PLACE and MEABRY *v.* DELEGAL.

May 3.

SPECIAL ASSUMPSIT. The first count stated, that before and at the time of the making of the promise of the defendant hereinafter next mentioned, the plaintiffs were executors of the last will and testament of one *John Miers*; and an estate called *Black Bank*, had been and was sold under the directions of the plaintiffs, as such executors, and before and at the time of the payment by the plaintiffs to the defendant, hereinafter next mentioned, the plaintiffs, to wit, as executors aforesaid, held in their hands certain monies as the produce of such sale. That, upon the death of the said *J. Miers*, one *William Miers* claimed to be entitled to a certain share of and in the said estate, and the proceeds thereof, when sold; and the said *W. Miers* became a bankrupt, and a certain commission of bankruptcy, founded on the statutes relating to bankrupts then in force, had been and was awarded against him after the death of the said *J. Miers*, and before the making of the defendant's promise hereinafter next mentioned, to wit, on the 23d *April*, 1829; and thereupon, before the making of the defendant's promise hereinafter next mentioned, to wit, on the 20th *May*, 1829, certain persons, to wit, *James Chart* and *Alfred Newman*, were appointed and became assignees of the estate and effects of the said *W. Miers* under the commission. That, before and at the time of the making of the defendant's promise next hereinafter mentioned, the said *J. Chart* and *A. Newman*, as such assignees, claimed to be entitled to, and required the plaintiffs to pay to them a certain sum, to wit, the sum of 32*l.* 6*s.* 6*d.*, being in the hands of the plaintiffs as such executors, in respect of the said *W. Miers's* said share of and in the produce of the said estate. That, before and at the time of the making of the defendant's promise hereinafter next mentioned, certain transactions and dealings had taken place between the said *W. Miers* and the defendant, and the defendant also claimed to be, and represented to the plaintiffs that he was, entitled to receive the said sum of 32*l.* 6*s.* 6*d.* of and from the plaintiffs, and then requested the plaintiffs to pay him, the defendant, the said sum of 32*l.* 6*s.* 6*d.* And thereupon heretofore, to wit, on the 26th *December*, 1834,

Where a party enters into a joint and several contract with three others, two of whom have a joint interest, but wholly separate from that of the third, such two ought to sue, without joining the third.

Therefore, where the defendant claimed a sum of money, as due from *J. Miers*, deceased, which was also claimed by *W. Miers*, the money being in the hands of *Evans*, as attorney to the plaintiffs, (the executors of *J. Miers*), he paid it over, by their directions, to the defendant, who gave an indemnity, addressed to "Mr. *Evans*, and also to Messrs. *Place & Meabry* (the plaintiffs), as the executors of the will of the late *J. Miers*," in

these terms: "I hereby undertake to indemnify and save you *and each of you* harmless from any claim that may be made against you" relative to the said sum of money. *W. Miers* having become bankrupt, his assignees sued the executors for the sum in question, together with another demand. The present defendant was apprised of the action, and it was defended with his concurrence, and the assignees obtained a verdict. The executors then sued the defendant, to recover the sum in question, and the costs of the former action. *Held*, first, that the action was properly brought by the executors, without joining *Evans*; and, secondly, that they were entitled to recover the whole of the costs of the former action, as they could not be apportioned.

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in consideration of the premises, and that the plaintiffs, at the request of the defendant, had paid to him the said sum of 32*l.* 6*s.* 6*d.*, in respect of the share of *W. Miers* or his assignees in the produce of the said estate called *Black Bank*, the defendant then undertook and promised the plaintiffs to indemnify the plaintiffs, and save them harmless from and against any claim that might be made against them in consequence of their having so paid the defendant the said sum of 32*l.* 6*s.* 6*d.*, whether by the said *W. Miers*, or any other person claiming through him. That thereupon, afterwards, to wit, on the 11th of *February*, 1835, by reason of the premises, and in consequence of the plaintiffs having so paid to the defendant the said sum of 32*l.* 6*s.* 6*d.*, the said *J. Chart* and *A. Newman*, as assignees of the estate and effects of *W. Miers*, as such bankrupt according to the statutes in force concerning bankrupts, and claiming through him, did implead the plaintiffs in an action on promises for the recovery of, amongst other monies, the said sum of 32*l.* 6*s.* 6*d.*, and such proceedings were thereupon had in that action, that the said *J. Chart* and *A. Newman*, as assignees, afterwards, to wit, in *Trinity* Term, 1835, by the consideration and judgment of the Court, &c., recovered in the same action against the plaintiffs a large sum, to wit, the sum of 32*l.* 6*s.* 6*d.*, and also the costs of the said *J. Chart* and *A. Newman*, as assignees in that behalf, amounting together to a large sum, that is to say, 89*l.*, for their damages, which they, as assignees, had sustained, as well by reason of the premises as for their costs and charges by them about their suit in that behalf expended; whereof the plaintiffs were convicted, as by the record and the proceedings thereof remaining in the said Court fully appeared; by means of which said several premises they, the plaintiffs, afterwards, to wit, on the 29th *July*, 1835, were called upon, and forced and obliged to pay, and did then necessarily pay and satisfy to *J. Chart* and *A. Newman*, as such assignees, the said sum of money so recovered, to wit, the said sum of 32*l.* 6*s.* 6*d.*, and the said costs, amounting together to the sum of 89*l.*; and thereby also the plaintiffs were obliged to pay, and did then pay to *J. Chart* and *A. Newman*, as such assignees, other monies, to wit, the amount of 40*l.* for other their costs by them incurred in the said action, of all which premises the defendant afterwards, to wit, on, &c., had notice, yet the defendant did not nor would, although often requested by plaintiffs so to do, pay the plaintiffs or either of them the said sums of 89*l.* or 40*l.*, or either of them, or any part thereof, and thereby or otherwise indemnify or save harmless the plaintiffs, according to the defendant's said promise; and, by reason of the premises, the plaintiffs were damnified to the amount of said sums of 89*l.* and 40*l.* contrary to defendant's promise.

At the trial, before *Tindal*, C. J., at the Sittings for *Westminster*, after last *Michaelmas* Term, the facts were proved as stated in the declaration; it was also proved, that the sale was effected by a Mr. *Evans*, as attorney for the plaintiffs, and that the sum of 32*l.* 6*s.* 6*d.* was paid over by him to the defendant, from whom he took a guarantee, which had been mislaid; and subsequently another agreement of indemnity had been drawn up, in which the names of the plaintiffs were introduced, and of which the following is a copy:

"Mr. *John Evans*, and also Messrs. *Place* & *Meabry*, as the executors of the will of the late Mr. *John Miers*:

"In consideration of your having paid to me the sum of 32*l.* 6*s.* 6*d.*, in

respect of the share of Mr. *Wm. Miers*, or of his assignees, in the produce of the estate called *Black Bank*, I hereby undertake to indemnify and save you and each of you harmless from any claim that may be made against you in consequence of your having so paid me the said sum of money, whether by the said *Wm. Miers* or any person claiming through him. *December* 26, 1834. *C. Delegal.*"

After the 32*l.* 6*s.* 6*d.* had been paid to the defendant, the assignees of *Miers* brought an action against the present plaintiffs to recover that sum, together with another which they claimed; the present defendant had notice of the action; a case was submitted to counsel, with his assent, and the action was thereupon defended. The then plaintiffs recovered a verdict, and the costs of that action amounted to 59*l.* 2*s.*; for which, together with the 32*l.* 6*s.* 6*d.* (amounting to 91*l.* 8*s.* 6*d.*), the present action was brought. The plaintiffs obtained a verdict, with leave to the defendants to move.

Talfourd, Serjt., in last *Hilary* Term, had accordingly obtained a rule *nisi* to enter the verdict for the defendant on the first count, or to reduce the damages to 32*l.* 6*s.* 6*d.* As to the first point, he argued, that the defendant's undertaking being to indemnify *Evans* and the two plaintiffs, *and each of them*, the action should have been brought either by all three, or only by one, as the contract was either *joint* or *several*, *Graham* v. *Robertson* (*a*), *Brand* v. *Boulcott* (*b*), *Eccleston* v. *Clipsham* (*c*), and the notes to that case (*d*), *Anderson* v. *Martindale* (*e*). As to the second point, the defendant's contract being only to indemnify *Evans* and the plaintiffs for the sum of 32*l.* 6*s.* 6*d.*, and the action against the plaintiffs having been for that sum, and another, not included in the guarantee, the defendant was not liable for the costs of that action, as they could not be apportioned.

Channell now shewed cause.—First point: The action is well brought by the present plaintiffs; the contract is made by the defendant, with *Evans* and the two plaintiffs, as executors of *J. Miers*, treating the latter as one party, and as such they must be considered in law; the contract is several with *Evans* and the executors; or even if it be joint, still, as *Evans* has no beneficial interest in the matter, he need not be joined: the clear intention of the parties was, that either *Evans* or the executors should be indemnified, whichever were sued by *W. Miers;* there was, therefore, a separate protection for them; they had a separate interest, and were therefore entitled to sue without joining *Evans; James* v. *Emery* (*f*), *Withers* v. *Bircham* (*g*). *Evans* could in no light be considered merely as the trustee for the plaintiffs.

Second point. The defendant had notice of the action by the assignees of *Miers* against the present plaintiffs, and it was with his concurrence that it was defended; he might have paid the 23*l.* 6*s.* 6*d.* into Court, and then he would not have been liable for any of the costs subsequently incurred by the present plaintiffs.

(*a*) 2 T. R. 282.
(*b*) 3 B. & P. 235.
(*c*) 1 Saund. 153.
(*d*) Ed. Wms. p. 154.
(*e*) 1 Ea. 497.
(*f*) 8 Taunt. 245, S. C., 2 Moo. 195; 5 Pri. 529.
(*g*) 3 B. & C. 254, S. C.; 5 D. & R 106.

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Talfourd, Serjt., in support of the rule, insisted upon his former arguments and authorities, and urged that the action by the assignees of *Miers* was not brought against the present plaintiffs in their character of executors.

TINDAL, C J.—The question whether the three parties mentioned in the defendant's contract of indemnity, ought to have joined as plaintiffs against him in the present action, must depend upon the relation in which the parties stood to each other, and the interest which they had in the subject matter of the agreement. Looking only at the language of the defendant's guarantee, it might be too much to say that upon the face of it there appears such a severance of interest as would entitle the two plaintiffs to sue without joining *Evans*; but, considering the relation of the parties, I think they may do so, and that the present action is well brought. *Evans*, it appears, is the attorney of the plaintiffs, who are the executors of *J. Miers*; *Evans*, therefore, stands in the character of agent, and the plaintiffs as principals; by their directions, he sells an estate which had belonged to their testator, and receives the money, part of which, namely, the sum of 32*l.* 6*s.* 6*d.*, is claimed by the defendant, and also by *W. Miers*; this sum, being in *Evans's* hands, is paid over, by the plaintiff's orders, to the defendant; and, as it was uncertain against whom *W. Miers* might seek to enforce his claim (whether against *Evans*, who had actually received the money, or against the plaintiffs, on whose account it had been received), the defendant's guarantee was penned in its present shape, so as to secure whichever party might be sued. The frame-work of this agreement is certainly singular, for it does not distinctly shew that the plaintiffs were under any liability to be sued as executors; but I think, looking at the whole transaction, it shews a separate interest in *Evans*, as one party, and in the plaintiffs, as another party. As, therefore, there is no joint interest to charge all three, the action could not be brought jointly by them; and the plaintiffs, having a separate interest, have properly brought the present action.

I am also of opinion, that the defendant is not entitled to have the damages reduced for the reasons given by Mr. *Channell*.

PARK, J.—In *Graham* v. *Robinson*, which has been relied on by the defendant, the plaintiffs, together with *A.* and *B.*, being owners of one ship and the defendant of another, a prize was taken, condemned and shared, by agreement, between them; afterwards, the sentence of condemnation was reversed, and restitution awarded, with costs, which was paid solely by the plaintiffs, *A.* and *B.* having, in the meantime, become bankrupts; and it was held that an action could not be brought by the plaintiffs alone for a moiety of the restitution money, and the costs, *because it was either a partnership transaction*, when *A.* and *B.* ought to be joined; *or not*, when separate actions should be brought by each of the persons paying. In the present case there was no joint interest between *Evans* and the plaintiffs; and the interest of the latter being distinct and separate, they were entitled to sue the defendant upon his guarantee.

BOSANQUET, J.—The interest of *Evans* is clearly different from that of the plaintiffs'; their interest is separate as regards *Evans*, but joint as regards themselves; and I think the action is properly brought by them only.

COLTMAN J.—I think we are not only to look at what was the interest of the parties at the time the contract was entered into, but we ought also to consider what party has a right to damages against the present defendant, in respect of the action brought by the assignees of *W. Miers*. Now, in that view, the plaintiffs are the only parties interested; if *Evans* had been joined as a plaintiff here, he would have been entitled to one-third of the damages to be recovered in this action; but he has clearly no title to them, as he was in no way damnified by the action brought by the assignees of *W. Miers*.

Rule discharged.

Ex parte HOLDSWORTH.

April 24.

VAUGHAN, J., had made an order, requiring Mr. *Callow*, an attorney, to deliver up to Mr. *Holdsworth*, the draft of his marriage settlement.

Where a husband had paid the charges of the marriage settlement upon his wife, the Court ordered an attorney to deliver him the draft thereof, although the latter claimed to retain it, as trustee.

Bompas, Serjt., moved to set aside this order; Mr. *Holdswoth*, it was admitted, had paid the charges for preparing the marriage settlement, by which certain property had been settled upon Mr. *Carlow* and a Mr. *Goode*, in trust for Mr. *Holdsworth*. He contended that, as trustees, they were entitled to retain the draft, Mr. *Carlow* not claiming to hold it as an attorney. —[*Tindal*, C. J.—Why should the trustees not give up the draft if Mr. *Holdsworth* has paid for it? As the husband of the *cestui que trust*, he would have a right to a copy of the marriage settlement.]—It is suggested, that Mr. *Holdsworth's* object is to pick a hole in the settlement.—[*Tindal*, C. J.—We cannot help that. If the attorney wishes to retain the draft he may do so; but then he must give Mr. *Holdsworth* a copy.]—The deed itself belongs to the trustees, as the legal owners of the property, *Harrington* v. *Price* (*a*), *Lightfoot* v. *Keane* (*b*), *Lord* v. *Wardle* (*c*), and therefore they have a right to the draft itself. Although in *Ex parte Honsfall* (*d*) it was held that an attorney, when ordered to deliver up the papers of his client, must deliver up the *drafts* of deeds for which he had been paid, as well as the deeds themselves, yet, there the client had a right to the original deeds. In this case equity, perhaps, might interfere, but law cannot.

TINDAL, C. J.—If this had been an application to have the deed itself delivered to Mr. *Holdsworth*, the result would have been different. But, as the husband of the *cestui que trust*, he has a right to know the trusts upon which the property has been settled upon his wife. He certainly would have been entitled to a copy of the marriage settlement, upon payment of the charges for making out such copy; but, instead of applying for that, he applies for the draft, which he has already paid for, and I think he has a right to have it. There might have been some ground for refusing his application,

(*a*) 3 B. & Ad. 170.
(*b*) 1 Mee. & W. 745; S. C. 2 Gale, 138.
(*c*) 3 Bing. N. C. 680; S. C. 4 Sc. 402.
(*d*) 7 B. & C. 528; S. C. 1 M. & R. 306.

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if it had been shewn that the deed contained matter which it was not proper that he should be acquainted with, but upon a mere suggestion that he wishes to find some fault with it, we cannot refuse his application.

The other judges concurring.

Rule refused.

May 4.

HORNE, Executor, &c., *v.* REDFEARN.

A letter in these terms: "I have received the sum of 20*l.*, which I have borrowed of you, and I have to be accountable for the said sum, with legal interest," *Held* to be admissible in evidence without a promissory note stamp, especially as it had been stamped with an agreement stamp.

THIS was an action by an executor, for money lent by the testator.

It was turned into a special case, and the sole question between the parties was, whether the following letter, being stamped as hereafter mentioned, was admissible in evidence:

"Sir, "*Middleton, December* 28, 1829.

"I have received the sum of 20*l.*, which I have borrowed of you, and I have to be accountable for the said sum, with legal interest. I am, &c."

Signed by the defendant, and addressed to the testator.

The paper was not delivered by the defendant at the time it bears date, or for some years afterwards, when it was stamped with a 1*l.* stamp, by the permission of the Commissioners of Stamps, on payment of the penalty of 5*l.*

The defendant contended that this document could not be given in evidence, for want of a proper stamp, it being a promissory note, and wanting a stamp, as such; and that the Commissioners of Stamps had no power to stamp it afterwards. The plaintiff contended that it was a mere acknowledgment or agreement, and that, the stamp impressed was sufficient.

If the Court were of opinion that the document was admissible, judgment was to be entered for the plaintiff; if they should be of opinion that it was not, then judgment was to be entered for the defendant.

Knowles, for the plaintiff.—The letter in question is merely an acknowledgment of a debt, and therefore required no stamp, *Fisher* v. *Leslie* (*a*), *Israel* v. *Israel* (*b*); or, if it requires any, an agreement stamp, which has been affixed to it, is the proper one, as it cannot be considered as a promissory note (*c*). It was probably written to prevent the operation of the Statute of Limitations; and if so, it would be exempted from stamp duty, under the 8th section of Lord *Tenterden's* Act (*d*).

W. H. Watson, for the defendant.—The letter in question is a promissory note, and ought to have been so stamped. No particular form is necessary

(*a*) 1 Esp. 426.

(*b*) 1 Camp. 499; see also *Childers* v. *Bulnois*, 1 Dowl. N. P. C. 8; *Barlow* v. *Broadhurst*, 4 Moo. 471; *Langdon* v. *Wilson*, 2 M. & R. 10; 7 B. & C. 640; *Morris* v. *Dixon*, 2 Har. & Wol. 57; 6 N. & M. 438; 4 A. & E. 845; *acc. Guy* or *Grey v. Harris*, Chit. Bills, 243, n. 2d ed.; 1 Camp. 501, n. *cont.*

(*c*) See *Williamson* v. *Bennett*, 2 Camp. 417; *Bolton* v. *Dugdale*, 1 N. & M. 412; 4 B. & Ad. 619.

(*d*) 9 G. 4, c. 14.

to constitute a note; *per Curiam*, in *Green* v. *Davis* (*e*). The defendant, in this letter, agrees to be accountable, which amounts to a promise to pay, and constitutes the document a promissory note, *Morris* v. *Lee* (*f*), *Wheatley* v. *Williams* (*g*), *Brooks* v. *Elkins* (*h*).—[*Coltman*, J.—In *Tomkins* v. *Ashby* (*i*) a memorandum in these terms, "Mr. *T.* has left in my hands 200*l.*," was held to be admissible in evidence without a stamp (*j*).]—In this case there was no promise to be accountable. As this instrument imports that interest is to be paid, it comes within the definition of promissory notes in the schedule to 55 *G.* 3, c. 184.

TINDAL, C. J.—This case, as it appears to me, may be decided, without reference to the authorities which have been cited at the bar, but simply upon the construction of the Stamp Act, 55 *G.* 3, c. 184; and, according to the view I take of that Act, I think that the document in question is not a promissory note, within its provisions. In the schedule to that Act, certain stamps, after a given rate, are to be affixed upon every "promissory note, for the payment, to the bearer *on demand*, of any sum of money," or "for the payment, in any other manner than to the bearer on demand," at certain *dates* there mentioned; now, the document in question cannot be considered as a promissory note within these descriptions, for it is neither payable *on demand* nor *at any specified date:* then follow these words:

"And the following instruments shall be deemed and taken to be promissory notes, within the intent of this schedule; viz.,

"All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, or if the same shall be definite or certain, and not amount, in the whole, to twenty pounds.

"And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum, importing that interest shall be paid for the money so deposited."

Now, it appears to me, that this instrument does not come within either of these two definitions; clearly not within the former; and, as to the latter, although the paper writing may, in some measure, be considered in the light of a *receipt*, yet it is not such a receipt as is described in the schedule of the Act: it looks, in my opinion, more like a mere acknowledgement of a debt than anything else. Supposing, however, that the form of this instrument would give it, in some degree, the character of a promissory note, still, I think that it would come within one of the "Exemptions from the duties on

(*e*) 4 B. & C. 235; S. C. 6 D. & R. 306; 1 C. & P. 451. And see *per Curiam*, in *Morris* v. *Lee*, *ut infra*.

(*f*) 2 Ld. Ray. 1396; S. C. 1 Stra. 629; 8 Mod. 362. In this case, the defendant, by the instrument in question, "*promised to be accountable* to the plaintiff for 100*l.* value received," and it was held to amount to a promissory note, but Sir *John Strange* adds "*quære* tamen" to his report of the case.

(*g*) 1 M. & W. 533; S. C. 2 Gale, 140.

(*h*) 2 M. & W. 74; S. C. 2 Gale, 200.

(*i*) 6 B. & C. 541; S. C. 9 D. & R. 543.

(*j*) In that case, Lord *Tenterden*, C. J., said, "I take it to be a settled principle, that *Acts of Parliament imposing duties, are to be so construed as* not *to make any instruments liable to them, unless it is manifestly the intention of the Legislature that such was the object.*"

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promissory notes" contained in the schedule to the Act; namely, "all other instruments bearing, in any degree, the form or style of promissory notes, but which in law should be deemed special agreements, except those hereby expressly directed to be deemed promissory notes;" for this document may be considered, in some measure, though certainly a remote one, as a special agreement between the parties, whereby one of them acknowledges that he has received certain moneys, and undertakes to be accountable for the same; but it does not appear in what manner he is to be accountable, whether by payment, or by set-off, or by giving credit for it in account, or by any other mercantile transaction between them. Upon the whole, therefore, I am of opinion, that this document does not come within the denomination of instruments mentioned in the Stamp Act as promissory notes; and it would be a peculiarly hard construction of that Statute to hold otherwise, as a larger stamp has been affixed to it than it would have required as a promissory note (*k*).

PARK, J., concurred.

BOSANQUET, J.—The fair and reasonable meaning of the words "for which I have to be accountable," appears to me to be, that the party will give credit for the sum mentioned in account; and this would be a special agreement, and, as such, this letter would fall within the express exemptions of the statute; and, as it has been stamped with a higher stamp than that required for a promissory note, we can do no injury to the revenue by this decision.

COLTMAN, J., concurred.

Judgment for the plaintiff.

(*k*) See sec. 10 of the Stamp Act, 55 G. 3, c. 184.

May 7.

HARRISON *v.* HEATHORN and others.

A replication having been delivered on the *Wednesday* before *Easter-day*, a demurrer thereto, delivered on the following *Wednesday*, is in sufficient time under R., E., 2 W. 4.

IN this case the replication, with a *similiter*, having been delivered on *Wednesday*, the 11th *April*, on the following *Wednesday*, the 18th, the defendant gave notice that the *similiter* had been struck out, and delivered a demurrer to the replication. The 15th was *Easter Sunday*.

W. H. Watson having obtained a rule *nisi* to set aside the demurrer for irregularity, and abide by the issue as delivered, on the ground that the demurrer had been delivered too late; as it should have been delivered within four days, exclusive, after the delivery of the issue (*a*);

C. Crompton now shewed cause.—In point of fact there had been no issue delivered, as the defendant refused to abide by the *similiter* added by the plaintiff. But, supposing the demurrer ought to have been delivered within

(*a*) See 2 Chit. Arch. 553.

four days, exclusive, after the 11th, that would have been on the 15th, which was *Easter Sunday;* and the two previous and two following days were *dies non*, *R.*, *E.*, 2 *W.* 4 (*b*). In *Charnock* v. *Smith* (*c*), *Williams*, J., said, that since that rule, "for all other purposes (except for notices of trial or inquiry), these two days (*Easter Monday* and *Tuesday*) would be unavailable." The 11th section of the Uniformity of Process Act (*d*) may be relied on by the other side, as shewing an intention, on the part of the Legislature, tacitly to repeal the before-mentioned rule, as that Statute was passed after the rule was promulgated; but, in fact, it corroborates that rule.

W. H. Watson, in support of his rule, relied upon the Statute last cited, and also referred to 1 *W.* 4, c. 70 (*e*), s. 6 (*f*), which applied only to the sittings of the Courts, and to *Hall* v. *Welchman* (*g*), and *Lilly* v. *Gompertz* (*h*).

TINDAL, C. J.—The Stat. 2 *W.* 4, c. 39, having been passed after the rule of E. 2 *W.* 4, it is necessary to see whether there is any variation between the two. It appears, however, that the 11th sec. of the Statute applies only to proceedings connected with *the return of writs*, but not to any other proceedings; but the language of the rule is much more general, embracing "rules, notices, and other proceedings," with the only exception of "notices of trial, or notices of inquiry." The question, therefore, in this case is, whether a delivery of a demurrer is an ordinary proceeding in a cause, and I think it is: and, consequently, that the replication having been delivered on the *Wednesday* before *Easter-day*, the delivery of the demurrer on the following *Wednesday* was in sufficient time.

PARK, J., and COLTMAN, J., concurred (*i*).

Rule discharged.

(*b*) "The days between *Thursday* next before, and the *Wednesday* next after *Easter-day*, shall not be reckoned or included in any rules, or notices, or *other proceedings*, except notices of trial, or notices of inquiry, in any of the Courts of Law at *Westminster*."

(*c*) 3 D. P. C. 607.

(*d*) 2 *W.* 4, c. 39, sec. 11, after reciting that "according to the present practice, in certain cases, no proceedings can be effectually had on any writ returnable within four days of any term, until the beginning of the ensuing term, whereby an unnecessary delay is sometimes created," enacts, that "if any writ of summons, &c., shall be served on any day, whether in term or vacation, all necessary proceedings to judgment and execution may be had thereon without delay, at the expiration of eight days from the service thereof, on whatever day the last of such eight days may fall, whether in term or vacation; provided, that if the last of such days shall fall on any day between the *Thursday* before and the *Wednesday* after *Easter-day*, then the *Wednesday* after *Easter-day* shall be considered the last of such eight days."

(*e*) Usually referred to, but incorrectly, as 11 *G.* 4, and 1 *W.* 4, c. 70. See 3 Chit. Gen. Prac. pt. 1, p. 90, and Charnock's Rules, 203, n.

(*f*) Enacting, "that if the whole or any number of the days intervening between the *Thursday* before and the *Wednesday* next after *Easter-day*, shall fall within *Easter* Term, there shall be no sittings in *banc* on any of such intervening days."

(*g*) 2 C. & J. 472.

(*h*) 1 D. P. C. 376.

(*i*) *Bosanquet*, J. was absent.

Common Pleas.

MARTIN *v.* SMITH.

In *assumpsit* for money received, a defence, that the transaction arose out of a wager which was illegal under the gaming Acts, is a matter in confession and avoidance, as relying upon "illegality of consideration by Statute," and must be specially pleaded since *R. H.*, 4 *W.* 4, I. *Assumpsit*, 1, 3. Therefore, where *O.* and *T.* had made a wager for 1,000*l.* upon a horse-race, which was illegal, under the Statute 9 *An.* c. 14, and the defendant took a share of 50*l.* on *O.'s* side, and the plaintiff took a share of 20*l.* in that sum from the defendant; and *O.* having won, paid the 50*l.* to the defendant, who refused to pay over the 20*l.* to the plaintiff, and the latter brought an action for money received, for the 20*l.* in which the defendant pleaded only the general issue:—*Held*, that he could not insist upon the illegality of the transaction.

ASSUMPSIT for money received. *Plea*, the general issue.

At the trial, before *Coltman*, J., it appeared, that a Mr. *Osbaldeston* had matched his horse, *Rattler*, to trot against *Sneezer*, a horse belonging to a Mr. *Theobald*, for 1,000*l.*; that *Osbaldeston* got the sum made up among his friends; that the defendant took a share of 50*l.* in the wager, on *Osbaldeston's* side, and that the plaintiff took a share of 20*l.* in that sum from the defendant. *Rattler* won. *Osbaldeston* received the stake, and paid the defendant the 50*l.*, who refused to pay the plaintiff the 20*l.*, but offered him 15*l.* The present action was brought for the 20*l.* The plaintiff obtained a verdict, leave being reserved to the defendant to move to enter a nonsuit.

Humfrey had accordingly obtained a rule *nisi*, upon the ground that the original wager was illegal, by 9 *An.* c. 14 (*a*), as the provisions of 13 *G.* 2, c. 19, and 18 *G.* 2, c. 34 (by which horse-races for less than 50*l.* are declared illegal), apply only to horse races on the turf, and not to trotting matches on the high-road, *Whaley* v. *Pajot* (*b*), *Shillito* v. *Theed* (*c*).

Martin now shewed cause.—It is admitted that the race was illegal, but this action is not brought upon the wager, but to recover money which the defendant has actually received for the plaintiff's use, though upon an illegal contract; the defendant, however, cannot set up the illegality of that contract

(*a*) Sec. 2 enacts, that "any person who shall, at any time, by playing at cards, dice, tables, *or other game or games whatsoever, or by betting at any of the games aforesaid*, lose the sum of 10*l.*, and shall pay the same, the person so losing shall be at liberty, within three months, to sue for and recover the money so lost from the winner, &c." This Statute has been held to include horse-racing; *Goodburn* v. *Marley*, 2 Stra. 1159; that was an action to recover 15*l.* won as a wager on a horse-race, and it was urged that *horse-racing* was mentioned in the previous statute, 16 *C.* 2, c. 7, and omitted in 9 *An.* c. 14; but the Court held it came within the general words "other game or games." From the previous enumeration of "cards, dice, and tables," it might have been supposed the Legislature meant "other games," *ejusdem generis*; and certainly, in common parlance, it is not usual to speak of "playing at a game" of *horse-racing*. According to a MS. note of this case, supplied by Mr. *Nolan*, "it was objected, that inasmuch as a late statute (13 *G.* 2, c. 19) was made against horse-racing, that is an argument that horse-racing was not prohibited by any of the former laws, for, if it were, this statute need not have been made, and therefore, it was said, it could not be within the statute 9 *An.* But to this it was answered by the Court, that, though horse-racing might not be unlawful, yet, betting at horse-races was so, and that the late Act of Parliament speaks only of running of horses or horse-racing, but speaks nothing of betting at horse-races, which is the present case:" but the Statute of *Anne* says, that money lost by *playing* at certain games, or by *betting* "at any of the games aforesaid, may be recovered by action;" if, therefore, horse-racing were not, by this Statute, rendered an unlawful game to play at, it is not easy to see how betting at it became unlawful. The decision, however, has been recognized, and acted upon as settled law; see *per Willes*, C. J., in *Lynall* v. *Longbotham*, 2 Wils. 38; *Blaxton* v. *Pye*, *ib.* 30; *Clayton* v. *Jennings*, 2 W. Bl. 786; *Broguet* v. *Marriott*, 1 Hodg. 383; 2 Hodg. 136; 2 Bing. N. C. 473; 2 Scott, 703.

(*b*) 2 B. & P. 51.

(*c*) 5 M. & P. 303; S. C. 7 Bing. 405.

against the present claim; *Tenant* v. *Elliott* (*d*), *Farmer* v. *Russell* (*e*); the original transaction was not absolutely void, but voidable only, *Vaughan* v. *Whitcomb* (*f*), and, as the plaintiff did not require the aid of that transaction to support his claim, he may enforce it at law, *Simpson* v. *Bloss* (*g*), *Cope* v. *Rowlands* (*h*).—[*Tindal*, C. J.—Can the plaintiff shew that the money was received to his use, without unrolling the whole contract, and shewing its illegality?]—If the defendant mean to insist upon the illegality, it ought to have been pleaded, and cannot be given in evidence under the general issue; *R. H.*, 4 *W.* 4 (*i*). The jury have found, as matter of fact, that the money was received to the plaintiff's use.—[*Coltman*, J.—The question is, can it be said to be received to the plaintiff's use, if received upon an illegal contract? —*Tindal*, C. J.—Whether money has been received to the plaintiff's use, is often a complicated question of law, built up upon independent facts.—*Bosanquet*, J.—The difficulty here is, that the plaintiff cannot shew the contract at all, without shewing its illegality.]—If the contract be void, still that must be pleaded, as in the case of a contract made by a married woman.—[*Tindal*, C. J.—But here the plaintiff, in order to make out his own case, must shew himself a party to a void contract; can he shew the receipt of the money by the defendant, without fixing a wound in his own side, from which he cannot recover?]—The Court cannot judicially see that the contract is illegal. Suppose it were a case of goods sold and delivered on an illegal contract.—[*Tindal*, C. J.—In that case, there would be a direct contract; here, the contract between the plaintiff and defendant is implied from the circumstances of the case; and do not they shew illegality in the transaction?]—The rule is imperative as to the necessity of pleading the illegality of the transaction. In *Potts* v. *Sparrow* (*j*) it was held, that the illegality of work and labour done could not be given in evidence under the general issue, but must be pleaded, although the illegality were essential, and not merely inferential. At common law, the money would have been received to the plaintiff's use; any Statute that makes it otherwise should have been pleaded. *Solly* v. *Neish* (*k*) may be cited on the other side, but it does not apply; for there the plea was held bad, as amounting to the general issue.

Humfrey.—The plea of *non-assumpsit* raises the issue, whether the receipt of the money was a receipt in law to the use of the plaintiff; it puts in issue all the facts from which the defendant's promise is to be implied.—[*Bosanquet*, J.—The rule does not say that *non-assumpsit* raises the issue whether the receipt were legal.]—Suppose the case of a married woman bringing an action for money received to her use; the instant it appeared she was married, it would be clear, without having pleaded the coverture, that the money was not received to her use. In an action by an apothecary, it is no necessary to plead that the plaintiff was not a certificated apothecary.—[*Bosanquet*, J.—That depends upon the very peculiar words of the Act (*l*), which require an apothecary to prove that fact on the trial.]—If the facts of

(*d*) 1 B. & P. 3.
(*e*) 1 B. & P. 296.
(*f*) 2 N. R. 413.
(*g*) 7 Taunt. 246.
(*h*) 2 Gale, 231; S. C. 2 M. & W. 149.
(*i*) *Pleadings in particular actions.* I. *Assumpsit*, 1, 3.
(*j*) 1 Hod. 135; S. C. 3 D. P. C. 630; 1 N. C. 594; 1 Sc. 578.
(*k*) 2 C. M. & R. 355; S. C. 1 Gale, 227; 4 D. P. C. 248.
(*l*) 55 *G.* 3, c. 194, s. 21

Common Pleas.

MARTIN v. SMITH.

this case were expanded by the defendant on the record, they would have amounted to the general issue, *Solly* v. *Neish*. In *Potts* v. *Sparrow*, the action was brought upon a consideration, which was *primâ facie* good, and the defence was clearly in confession and avoidance; the defendant there had to shew the illegality of the contract; but here, the plaintiff must shew the illegality in proving his own case. If the doctrine contended for on the other side be correct, it would be necessary to plead the Statute of Frauds in every case.—(*Martin*.—The Statute of Frauds stands upon the same footing as the Apothecaries' Act; it merely requires certain evidence to be adduced at the trial.)

TINDAL, C. J.—Upon consideration, I am of opinion, that the objection which the defendant insists upon against the plaintiff's right of action, resolves itself into a question of illegality of consideration, and that, as such, it ought, under the new rules, to have been pleaded. The first rule says, "In all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non-assumpsit* shall operate only as a denial, in fact, of the express contract as alleged, or *of the matters of fact* from which the contract or promise alleged may be implied by law." Here is, therefore, a broad distinction between actions of *assumpsit* on *express* and those on *implied* contracts; in *express* contracts, the plea of *non-assumpsit* puts in issue only the *fact of the contract;* while in *implied* contracts it puts in issue the *matters of fact* from which the contract is implied in law. There are examples given of each class of cases; first, of *express* contracts, as in the cases of warranty, &c., and then of *implied* contracts. Among these examples we have the following; "In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non-assumpsit* will operate as a denial of the sale and delivery, in point of fact." Now, let us pause here a moment. Suppose an action brought for goods sold and delivered, arising out of a smuggling transaction; I think it is clear that the defendant could not avail himself of the objection as to the illegality of the contract without pleading it. The rule proceeds, "in the like action for money had and received, it will operate as a denial, both of the receipt of the money, and *the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff*"—not as an allegation of the existence of facts which would render the receipt *not* a receipt to the use of the plaintiff; and I do not see how we can infer from the rule, that the general issue is to raise an issue in law as well as an issue in fact; or, in other words, that it should perform the double issue of a demurrer and a plea. Then we must couple the third rule with the first; the third, dealing with the converse of the proposition laid down in the first. "In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.*, infancy, coverture, release, payment, performance, *illegality of consideration*, either by *statute* or common law;" here we may stop; for it seems to me impossible not to see that the defence in this action is an "illegality of consideration by statute." Taking, therefore, both these rules together, I am of opinion, that the defence in this case ought to have been pleaded. The present case is distinguishable from that which has been suggested in argument, of an action for money received brought by a married woman; as in that case it would be shewn that the money could not be received to the plaintiff's use;

and *non-assumpsit* would deny the existence of the facts necessary to constitute the receipt by the defendant a receipt to the plaintiff's use.

PARK, J.—As this is, I believe, the first case which has been decided upon this particular branch of the new rules, it is to be wished that the principle of our decision should be well understood. I have been some time of opinion, that the language of the first of these rules now under consideration was too general to be restrained; the words are, "in *all* actions of *assumpsit*," and then there are express exceptions of actions upon bills and notes, which more clearly shews that the rule applies to all others; and further, as applicable to this case, the action for money had and received is expressly included among the examples set forth to illustrate the rule; and it is laid down that, in that form of action, the plea of *non-assumpsit* shall be considered to deny "both the receipt of the money and *the existence of* those *facts* which make such receipt by the defendant a receipt to the use of the plaintiff." Then there is the third rule, which has been already adverted to, and which strengthens this view of the case. The object of these rules was to give notice to the parties what was intended to contest in the action, and that the defendant should put his defence upon the record for that purpose. Formerly, *illegality of consideration* was a defence under *non-assumpsit;* but this third rule expressly provides that "illegality of consideration, either by statute or common law," shall be specially pleaded; and it appears clear to me, that the present defence is "illegality of consideration by statute law."

BOSANQUET, J.—The defence in this action is, that the transaction is void by reason of its illegality. The great object of these rules was, that the plaintiff should know what objections he may have to meet at the trial. Now, what are the circumstances of this case? The defendant takes a share of 50*l.* in a wager between two other parties, who are strangers to this action; the plaintiff takes a portion of that share, amounting to 20*l.*; the party in whose wager the plaintiff and defendant were thus both interested, wins, and the defendant receives his 50*l.*; then the question is, do these facts make "such receipt by the defendant a receipt (as far as the 20*l.* is concerned), to the use of the plaintiff?" Undoubtedly they do, unless some law can be shewn by which the transaction can be shewn to be illegal; then it is said that the transaction was in fact illegal under the Statutes against Gaming. What is this, then, but setting up the "illegality of the consideration (of the implied contract) by statute law?"

COLTMAN, J.—When the case was before me at the trial, I at first thought, looking merely at the first rule, that the ground taken up by the defendant was good, and that there was no necessity to plead this defence specially; but, upon considering the third rule also, I was of opinion that it ought to have been pleaded, and that opinion I still adhere to, upon the words of the third rule, that "illegality of consideration" must be pleaded, illegality of consideration being an answer to a *primâ facie* case. In the case put, of a plaintiff in an action for money had and received being a married woman, upon the proof of that fact, it would be shewn that the plaintiff had not even a *primâ facie* case (*m*).

Rule discharged.

(*m*) By the third rule, above cited, it will be seen that *coverture* must be specially pleaded.

Common Pleas.

May 7.

YOUNG *v.* MANTZ.

In covenant for not leaving a house in repair, the defendant may shew the *general* state of the premises at the time of the demise, but he cannot go into *particulars*.

COVENANT for not leaving in repair certain premises demised to the defendant in 1830.

The covenant in the lease was in the usual form, to keep the premises in good and tenantable repair, reasonable wear and tear excepted.

At the trial, before *Coltman*, J., at *Guildhall*, after last *Hilary* Term it was proved that the buildings were more than 100 years old. It was proposed by the defendant to inquire whether some particular defects in the building did not exist in 1830, at the time the defendant entered; but the question was objected to by the plaintiff's counsel, and the objection was allowed by the learned judge, who said, that the defendant might shew, *generally*, in what state the premises were at the time he entered, but that he could not be allowed to go into *particulars*. The dilapidations proved amounted to 155*l*. The plaintiff obtained a verdict for 55*l*.

Byles had obtained a rule *nisi* for a new trial, on the ground of improper rejection of evidence.

Bassett was to have shewed cause, but, after referring to *Stanley* v. *Towgood* (*a*), was stopped by the Court.

Byles and *Hindmarsh*, in support of the rule.—The defendant was only bound to keep the premises in the state in which they were at the time of the demise, *Gutteridge* v. *Munyard* (*b*). The defendant, therefore, had a right to inquire what the particular defects were at that time.

TINDAL, C. J.—I see no reason for disturbing the verdict in this case. The defendant, at the trial, was allowed to go into general evidence to shew the state of the premises at the time he entered, but was not permitted to inquire whether some of the particular defects complained of did not exist at that time; and this I think was a just and proper decision. The covenant in question is intelligible enough; that the tenant shall keep and leave the premises in good and tenantable repair, reasonable wear and tear excepted; and there must be such an understanding of this covenant, that the jury must look at what was the general state of the premises at the time the tenancy commenced; for the landlord is not to have a new house for an old one. In this case I think justice has been done; it was proved, by the schedule of dilapidations, that it would have cost 155*l*. to put the premises into thorough repair, and the jury gave the plaintiff a verdict for 55*l*., taking, probably, the age of the premises into their consideration.

PARK, J.—Of the same opinion.

(*a*) 2 Hod. 132; S. C. 3 Bing. N. C. 4; 3 Sc. 313.

(*b*) 1 Mo. & Rob. 334; S. C. 7 C. & P. 129.

COLTMAN, J. (*c*).—It is a relaxation of the rigour of the covenant, to allow any evidence of this nature; but persons must be supposed to enter into such a covenant with respect to the state of the premises at the time of the demise; that is, as to their *general* state; for it cannot be allowed that a tenant should go into evidence as to the state of every beam or lath about the house. The allowance of any evidence is not so much a matter of strict law, as of convenience and good sense.

Rule discharged.

(*c*) *Bosanquet*, J., was absent.

WOLFE *v.* HOOPER.

May 7.

In an action, in which, by the pleadings inconsistent issues were raised, a verdict was found for the plaintiff, and the cause was referred to an arbitrator, with liberty to certify:—*Held*, that he could not certify that a verdict should be entered *generally* for the defendant, but should have ordered the verdict to be entered in the same way that a jury must have found it.

THIS was an action of *assumpsit* for work and labour, and money paid; to which the defendant pleaded the general issue; the Statute of Limitations; payment, and a set-off. A verdict had been entered by consent for the plaintiff, the cause being referred to a barrister to certify. The arbitrator had certified that the verdict should be entered for the defendant generally.

Talfourd, Serjt., on a former day in this Term, had obtained a rule *nisi* to amend this certificate by entering the verdict for the defendant on the general issue, and upon the plea of the Statute of Limitations, and for the plaintiff upon the two other issues.

R. V. Richards shewed cause.—He contended the certificate was correct, the only point in the cause being, whether anything was due from the defendant.—[*Tindal*, C. J.—The reference of "this cause," means, all issues in this cause.]—If the plaintiff is not entitled to anything, the verdict ought to be for the defendant generally.

Talfourd, in support of the rule.—The real meaning of the order of reference is, that the arbitrator should certify on each issue; the verdict, at present, is upon inconsistent issues; the plea of *non assumpsit* denying the plaintiff's claim, and the plea of payment admitting it.

TINDAL, C. J.—In good sense, and I see no reason why not in law also, our decision ought to be with the party making this application. Here is a cause referred, with a verdict entered for the plaintiff, liberty being reserved to the arbitrator to set aside this verdict, and enter a verdict for the defendant; and he certifies that the verdict should be entered for the defendant *generally* The order of reference must be taken *secundum subjectam materiam*; and, as the arbitrator was put in the place of a jury, he ought to find the verdict in the same manner as the jury must have found it.

Rule absolute.

Common Pleas.

May 7.

A broker having, at the request of his principal, purchased some Spanish bonds from *H.*, paid him the purchase-money. *Held*, that he might sue his principal for money paid, and that the latter could not set up as a defence that the contract with *H.* was not in writing within the 17th sec. of the Statute of Frauds. *Quære*, whether a contract for *Spanish bonds* is within that section.

PAWLE *v.* GUNN.

ASSUMPSIT for money paid. *Plea, non-assumpsit* (*a*).

The cause was tried before *Tindal*, C. J.; when it was proved that the defendant had authorized the plaintiff, a stock-broker, to purchase some *Spanish bonds* for him; that the plaintiff accordingly entered into a contract of sale with one *Hitchcock*, for the purchase of some such bonds, to be delivered at a future time; that such contract was not signed, each party having merely written down the terms of the contract in his own book, and that the price of the bonds had been paid by the plaintiff to *Hitchcock*. It also appeared that, by the custom of the *Stock Exchange*, the plaintiff was liable to make such payments. The plaintiff obtained a verdict.

Currie, in *Hilary* Term, obtained a rule *nisi* for a new trial, upon the ground that the contract was not signed as required by the 17th sec. of the Statute of Frauds (*b*), foreign bonds being, as he contended, *goods*, within that section; he cited *Pickering* v. *Appleby* (*c*), and *Crull* v. *Dodson* (*d*). If the plaintiff had any cause of action, it was upon an implied indemnity, and he should have declared accordingly, *Spencer* v. *Barry* (*e*).

Bompas, serjeant, and *R. V. Richards*, now shewed cause.—If the defendant meant to insist upon the illegality of the contract, he should have pleaded specially.—[*Tindal*, C. J.—We decided that point the other day (*f*). But the question here is, not as to the illegality of the contract, but whether the subject matter of the contract was within the Statute of Frauds, so as to require the contract to be in writing.—The *bonds* in question had been delivered by *Hitchcock* to the plaintiff, and the money for them had been paid; the contract, therefore, had been executed, and the case was not within the Statute; besides, although these documents were called *bonds*, they were not so in fact, but merely evidence of a debt from the *Spanish* government; they were in the nature of foreign stock, which was unknown at the time of the Statute of Frauds, and was not within the operation of that Act; *Colt* v. *Netterill* (*g*). But the applicability of that Statute is beside the question; the plaintiff was authorised by the defendant to purchase *Spanish bonds*, and had, accordingly, entered into the contract of sale with *Hitchcock*, in furtherance of which, he paid the price of the bonds to him, as he was bound to do; this was money paid to the defendant's use, and he could not be allowed

(*a*) There were other pleadings, but they were immaterial to the point decided.

(*b*) 29 C. 2, c. 3, enacting, that "no contract for the sale of any *goods, wares, or merchandize* for the price of 10*l.* shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or that some note or *memorandum in writing* of the said bargain be made and *signed* by the parties to be charged by such contract or their agents thereunto lawfully authorized.

(*c*) 1 Com. R. 354.

(*d*) Select cases in Chancery, 41; S. C. Eq. Ca. Abr. 51.

(*e*) 1 Har. & Wol. 179; S. C. 3 Ad. & El. 331; 4 Nev. & Man. 770.

(*f*) See *Martin* v. *Smith*, *ante*, p. 194.

(*g*) 2 P. Wms. 304.

to invalidate the contract; if a man employs an agent to do an act, which he knows must be inevitably followed by another act, the principal must be considered to have employed the agent for such second act.

Corrie, in support of the rule.—The bonds in question were "goods" within the meaning of the Statute of Frauds, which was a remedial Act; and although some early decisions confined its operation to *executed* contracts, *Clayton* v. *Andrews* (*h*); yet later cases have extended it to *executory* contracts; *Rondeau* v. *Wyatt* (*i*), *Garbutt* v. *Watson* (*j*). To shew that the bonds might be considered "goods," he cited Lord *Tenterden's* judgment in *Bullock* v. *Dodds* (*k*); *Mussell* v. *Cook* (*l*), *Ford* v. *Shelden* (*m*), *Ryall* v. *Rowles* (*n*), *Longman* v. *Tripp* (*o*), *Hornblower* v. *Pond* (*p*), *Cumming* v. *Bailey* (*q*), *York* v. *Twine* (*r*), *Caley's Case* (*s*), *Willows* v. *Ball* (*t*), and *Heath* v. *Hall* (*u*).

TINDAL, C. J.—(After referring to the other pleadings, which his Lordship said were wholly immaterial to the question under discussion,)—I look at the record as containing only the general issue to a count for money paid; now, in order to maintain his action, the plaintiff must shew a payment by him made, either under compulsion for the defendant's benefit, or at the defendant's express request; in this case there was no express request for the actual payment of the money, although the plaintiff had, at the defendant's request, entered into a contract to purchase certain *Spanish* bonds; it then becomes necessary for the plaintiff to shew that, having so entered into this contract, he was compelled to pay the money; and this he did shew at the trial. It is not necessary, therefore, to enter into the question as to whether this was a contract within the Statute of Frauds, which has been ingeniously argued by the counsel for the defendant. I am not aware of any case where it has been held, that an agent, who has been employed to enter into a contract, and has been allowed to make a payment in respect thereof on behalf of his principal, was not entitled to recover the money so paid. It appears to me it would be against justice and law so to decide. I think, therefore, that the money must be considered to have been paid to the defendant's use, in the language of the declaration, "at his request;" as such request must necessarily be inferred from the circumstances of the case; and I am not disposed to disturb the verdict.

The other judges concurred.

Rule discharged.

(*h*) 4 Burr. 2101.
(*i*) 2 H. Bl. 65.
(*j*) 5 B. & A. 613; 1 D. & R. 219.
(*k*) 2 B. & A. 258, 276.
(*l*) Finch, Prec. in Ch. 533.
(*m*) 12 Rep. 1.
(*n*) 1 Ves. sen. 348; 1 Atk. 165; 1 Wils. 260.
(*o*) 2 N. R. 67.
(*p*) 2 B. & A. 327.
(*q*) 6 Bing. 363; 4 M. & P. 36.
(*r*) Cro. Jac. 78.
(*s*) 8 Rep. 32.
(*t*) 2 N. R. 376.
(*u*) 4 Taunt. 326.

Common Pleas.

May 9.

POENSGEN and another *v.* CHANTER and GRAY.

Where an action has been erroneously commenced against two defendants, the Court will not allow the plaintiff (unless he has been misled by the defendants) to discontinue, without payment of costs.

ASSUMPSIT for money received.

The plaintiffs had entered into a contract with the defendant, *Chanter*, for fitting up a steam-engine with a "patent copper fire-box," and had paid 950*l.* in respect thereof; the agreement was signed by *Chanter* "for self and Co.;" he had also left a printed circular at the plaintiff's offices, in which *Chanter* and *Gray* were mentioned as partners in a patent for "a smoke-consuming furnace." The contract not having been fulfilled, the present action was brought to recover the 950*l.*, and the defendant, *Chanter*, had been held to bail; it was afterwards discovered that *Gray* was not a partner with *Chanter* in the "patent copper fire-box" concern; whereupon

Wilde, Serjt., obtained a rule *nisi*, for leave to discontinue, without payment of costs.

Saunders shewed cause. The affidavit of debt which had been made by the plaintiff's attorney, had been sworn rashly, but that was no reason why the plaintiffs should have an indulgence shewn them; there had been nothing done on the part of either *Chanter* or *Gray* to mislead the plaintiffs; for the circular, in which they were spoken of as partners, referred to quite another subject from that in respect of which the contract was entered into.

Wilde, in support of the rule.—The plaintiffs have been misled by *Chanter;* and, at any rate, *Gray* has been put to no inconvenience.

TINDAL, C. J.—The plaintiff has always a right to discontinue his action; but if he does, the defendant, by the Statute of *Elizabeth* (*a*), is entitled to his costs. Cases may certainly arise where a plaintiff has been misled by the defendant, in which the Court would allow him to discontinue without payment of costs; but the question is, has there been any such misleading in this instance? It does not appear to me that there has. (His Lordship recapitulated the facts of the case). There is no misinformation in all this; and there does not appear to have been any application to the defendants to ascertain the real state of circumstances. There may have been a fair ground for the plaintiff's attorney believing that the defendants on the record were partners, so as to preclude any action for a malicious arrest; but, in the absence of all misinformation on the part of either of the defendants, we cannot grant the indulgence sought by the plaintiff.

PARK, J.—Although there is no ground for imputing wilful perjury to the party who made the affidavit of debt in this case, yet I must say, that I think oaths are often taken much too lightly, and that such has been the case in the present instance. The plaintiffs ought to have made some enquiries upon the subject. And, as there appears to have been perfect *bona fides* on the part of the defendant, the plaintiff's application cannot be granted.

(*a*) 8 El. c. 2.

BOSANQUET, J.—The plaintiffs were not misled by any culpable act on the part of the defendant. The printed circular and the agreement shewed that two firms existed, and should have put the plaintiffs on enquiry.

COLTMAN, J., concurred.

Rule discharged.

HOLMES and another *v.* BININE.

May 10.

THE plaintiffs had brought the present action as the public officers of a banking company, under 7 *G.* 4, c. 46; the defendant had been arrested, and the pleadings had proceeded to issue.

Where two plaintiffs had sued as public officers of a banking company, and by sec. 9 of the Banking Act (7 G. 4, c. 46), the action should have been brought by one only, even though issue had been joined, the Court allowed the plaintiffs to amend (by striking out one of their names) upon payment of costs.

Wilde, Serjt., on a former day in this Term, had obtained a rule *nisi* to amend the writ, the declaration, and the issue, upon payment of costs, by striking out the name of one of the plaintiffs, as by the 9th section of the Act, actions might be instituted in the name of *any one* of the public officers of a banking company; the former Act, 39 & 40 *G.* 3, c. 28, mentioned *officers* in the plural, and thence the mistake had arisen; he cited *Baker* v. *Neaver* (*a*).

Andrews, Serjt., shewed cause; he contended the plaintiffs ought to discontinue, as it was their own blunder.

TINDAL, C. J.—This does not appear to be an unreasonable application; it is made to prevent expense, and the defendant cannot be in a worse situation by acceding to it, as all his costs will be paid to him.

Rule absolute.

(*a*) I D. P. C. 616; I C. & M. 112.

COX *v.* CANNEN.

May 10.

PRICE, on a former day in this Term, had obtained a rule *nisi* to set aside a warrant of attorney executed by the defendant, a prisoner, on the ground that the attesting witness was an uncertificated attorney, and himself a prisoner (*a*); and that these facts were known to the plaintiff.

If a prisoner sends for a party as his attorney to attest a warrant of attorney, he cannot afterwards set it aside on the ground that such person was uncertificated at the time, unless he shews he was not aware of that fact. *Semble*, that the fact of the attorney being himself a prisoner is of no importance.

Peacock shewed cause; by his affidavits the plaintiff's knowledge of the above facts was denied; and it further appeared that the defendant, upon being told that he must have an attorney present on his part at the execution of the warrant of attorney, sent for the party in question, who attended, and attested on his behalf. He relied upon *Jeyes* v. *Booth* (*b*).

(*a*) See R. H., 2 W. 4, r. 1, s. 72. (*b*) 1 B. & P. 97.

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Price, in support of the rule.—The fact of the attesting witness being himself a prisoner, is of importance, and it has been decided that the presence and attestation of an uncertificated attorney is insufficient, *Verge* v. *Dodd* (c).

TINDAL, C. J.—The present case is not to be distinguished from *Jeyes* v. *Booth*, except that here there was no actual misrepresentation by the defendant; the fact of the attorney being a prisoner, does not strike me as being important; but, at any rate, the defendant ought to have shewn that he himself did not know the situation of the witness (*d*).

Rule discharged.

(*c*) Tidd, N. P. 279.

(*d*) See *Walker* v. *Gardner*, 4 B. & Ad. 371; *Todd* v. *Gompertz*, 1 Will. Woll. & Hodg. 69; 6 D. P. C. 296; *Wallace* v. *Brockley*, 1 Will. Woll. & Dav. 382; 5 D. P. C. 695.

May 10.

DOE, dem. KNOTT *v.* LAWTON and others.

A devise "to my sons *J.* and *J.* my *estate* that I now occupy, together with the factory, &c., thereon; except the house I now occupy, &c., which I give to my daughters, *M.* and *A.* jointly, share and share alike:"—*Held*, that the daughters took all the testator's *interest* in the premises excepted.

THIS was an action of ejectment; and the facts were turned into a special case for the opinion of the Court.

James Knott, of *Lees*, in the parish of *Under Lyne*, in the county of *Lancaster*, by his last will and testament, signed with his hand, attested and subscribed in his presence by three credible witnesses, and bearing date the 2d *February*, 1824, after directing payment of his debts and funeral and testamentary expenses and giving a legacy of 1*l.* to his eldest son, *John*, (whom he appointed his executor), made a devise in the following words: "I give and bequeath to my sons, *James* and *Joshua*, *my estate that I now occupy*, together with the factory, and all the edifices and appurtenances thereon, *except the house I now occupy*, and five yards for a passage, being together eighteen yards in front, and about twenty yards back, with the cottages thereon, occupied by *Daniel Clegg* and Mr. *Cleverty*, and all other conveniences thereon, which I give to my daughters, *Martha* and *Alice*, jointly, share and share alike."

He then devised to his daughter, *Martha*, a smithy, and to his daughter, *Alice*, a plot of land, and building thereon, occupied by certain persons named, and, after charging the "estate heretofore given to his sons" with certain payments, particularly specified in a subsequent part of the will, he bequeathed to *Joshua* "that *estate or tenement* lying and being at *Hartshead*, occupied by *R. F.*, which I hold under lease from the Earl of *Stamford* and *Warrington*, during the term of my lease."

The said *James Knott* was, at the time of making his will, seised in fee-simple of all the premises described in the first of the above devises, and died seised thereof in *September*, 1826, without having revoked or altered his said will, leaving his said son, *John*, heir at law, and his said sons, *James* and *Joshua*, him surviving. The daughters, *Martha* and *Alice*, both survived the testator. *Martha* is still living, but *Alice* died in *August*, 1836, leaving her husband, *James Mellor*, and one son, born of the marriage, her surviving.

John Knott, the testator's eldest son and heir at law, died in the life-time of *Alice*, intestate as to his real estate, and without leaving lawful issue; and

thereupon *James Knott*, the lessor of the plaintiff, being the testator's second son, became and was the heir at law, as well of the testator, *James Knott*, as of the said *John Knott*.

The defendants were the tenants in possession of the premises which were so devised as above-mentioned by the testator to his "daughters, *Martha* and *Alice* jointly, share and share alike." And the defendants, disclaiming the title of the lessor of the plaintiff, claimed to hold the said premises adversely to the lessor of the plaintiff, and as tenants thereof to the said *James Mellor*, and the said *Martha*, or one of them.

The lessor of the plaintiff contended, that under the above devise, the daughters of the testator, *Alice* and *Martha*, took, as tenants in common, only estates for life in the devised premises, and that, upon the death of *Alice*, the lessor of the plaintiff as heir at law, as aforesaid, became and was entitled to an undivided moiety of the said premises, or that the lessor of the plaintiff was entitled thereto, or to part thereof, as joint devisee in fee in remainder, with his brother, *Joshua Knott*, under the above devise.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in this action. If the Court should be of that opinion, then the defendants agreed that judgment should be entered against them by confession for 1*s*. damages. And if the Court should be of opinion that the plaintiff was not entitled to recover in this action, then the lessor of the plaintiff agreed that a judgment should be entered against the plaintiff of *nolle prosequi*.

The case was argued in *Hilary* Term, by

Wilde, Serjt., for the lessor of the plaintiff. Both the sons and the daughters took only an estate for life; where the word "estate" is used in a will, unrestrained by other words, it is descriptive of the testator's *interest*, and not merely of the *corpus* of the property; and in that case, whatever interest the testator may have had in such estate, passes to the devisee; but where it is used with words of *locality*, the intention of the testator is to be sought from the general tenor of the will, and the word "estate" may be construed to mean the *corpus* of the property, so as to confer on the devisee an estate for life only, as the Courts will not disinherit the heir unless express words of limitation are used, or expressions which beyond all doubt shew the testator's intention to give an estate in fee to the devisee; the rule is so laid down by *Mansfield*, C. J., in *Doe* v. *Child* (*a*). Such intention cannot be presumed in this case, as the testator, though he only left his eldest son a legacy of 1*l*., has shewn his confidence in him by appointing him executor; and the smallness of the legacy was probably owing to the fact, that the testator contemplated that the remainder would pass by his will to his heir. The description, therefore, limits the effect of the word "estate;" in favour of this construction are the cases of

(*a*) 1 N. R. 345. Henceforward the contrary rule will prevail; as by 1 *Vic.* c. 26, s. 28, "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

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Doe, dem. KNOTT v. LAWTON.

Pettiward v. *Prescott* (*b*); *Roe*, d. *Kirby* v. *Holmes* (*c*); *Doe*, d. *Sewell* v. *Parratt* (*d*); *Doe*, d *Norris* v. *Tucker* (*e*); *Gwillim* v. *Gwillim* (*f*); *Doe*, d. *Ashby* v. *Baines* (*g*); *Goodright*, d. *Drewry* v. *Barron* (*h*); and *Doe*, d. *Viner* v. *Eve* (*i*). In *Gardner* v. *Harding* (*j*), and *Gall* v. *Esdaile* (*k*), it was assumed that *Pettiward* v. *Prescott* was overruled by *Roe*, d. *Child* v. *Wright* (*l*), and *Randall* v. *Tuchin* (*m*); but, in fact, that case was not brought under the consideration of the Court on either of those occasions. In the latter part of this will, the testator leaves to his son, *Joshua*, his *estate at Hartshead, during the term of his lease*. It is clear that, in this instance, he uses the word "estate" merely to designate the property; as he afterwards adds the interest he intends to pass, namely, the residue of his term; if, therefore, the Court adopt the construction of the word "estate" to be contended for on the other side, with reference to the devise to the daughters, they will have to put a different construction on the same word, in the same instrument, which, though it may be done in cases of necessity, the Courts are always anxious to avoid.

Mellor, for the defendants. The doctrine that the heir is to be *favoured*, may be considered as exploded; *Doe*, d. *Wickham* v. *Turner* (*n*), *Tolderoy* v. *Colt* (*o*), and the *onus* in this case lies upon him to shew that the intention of the testator was to give the remainder to him, as he seeks to narrow the ordinary and obvious meaning of the words used in the will. The *heir* undoubtedly has a *primâ facie* title, but that title is upset in the present case by a better, namely, a devise under a will; in which the Court will endeavour to ascertain the intention of the testator, as there are no words of so inflexible a nature, as will not bend to that intention, when it can be collected from the context of the will; *Roe* v. *Pattison* (*p*); *Denn*, d. *Bridam* v. *Page* (*q*); *Wilce* v. *Wilce* (*r*); *Edwards* v. *Barnes* (*s*). The intention here would rather seem to be to disinherit the heir, as the testator has left him merely a nominal legacy. *Pettiward* v. *Prescott* has always been considered as overruled; and it is only the opinion of one judge, however eminent; against which there are the opinions of twelve other judges. It has been repeatedly decided, that the word "estate," unless expressly narrowed by the context, will carry the fee; *Ibbetson* v. *Beckwith* (*t*); *Tuffnell* v. *Page* (*u*); *Roe*, d. *Child* v. *Wright* (*v*); *Holdfast* v. *Marten* (*w*); *Roe*, d. *Allport* v. *Bacon* (*x*); *Uthwatt* v. *Bryant* (*y*); *Randall* v. *Tuchin* (*z*); *Chichester* v. *Oxendon* (*a*); *Gard-*

(*b*) 7 Ves. 541.
(*c*) 2 Wils. 80.
(*d*) 3 B. & Ad. 463.
(*e*) 3 B. & Ad. 473.
(*f*) 5 B. & Ad. 22; 2 N. & M. 247.
(*g*) 2 C. M. & R. 23; 1 Gale, 135.
(*h*) 11 Ea. 220.
(*i*) 5 Ad. & El. 317.
(*j*) 3 Moo. 565.
(*k*) 8 Bing. 323; 1 Mo. & S. 466; 1 Russ. & Mylne, 540.
(*l*) 7 Ea. 259.
(*m*) 2 Marsh. 113; S. C. 6 Taunt. 410.
(*n*) 2 D. & R. 898.
(*o*) 1 M. & W. 250.
(*p*) 16 Ea. 221.
(*q*) 1 B. & P. 261, n.
(*r*) 7 Bing. 664; 5 M. & P. 682.
(*s*) 2 N. C. 252; 1 Hodg. 293; 2 Scott, 411.
(*t*) Ca. Temp. Talb. 157.
(*u*) 2 Atk. 37.
(*v*) *Ut supra.*
(*w*) 1 T. R. 411.
(*x*) 4 M. & S. 366.
(*y*) 6 Taunt. 317.
(*z*) *Ut supra.*
(*a*) 4 Taunt. 176; S. C. 4 Dow. 92.

ner v. *Harding* (*b*); *Richardson* v. *Hood* (*c*); *Bailis* v. *Gale* (*d*). It is most important to observe the collocation of the words; and the word "estate" must be taken to override the whole sentence; *Goff* v. *Haward* (*e*); *Grayson* v. *Atkinson* (*f*). *Gall* v. *Esdaile* (*g*), goes further than the present case; and it has never yet been overruled or shaken by any subsequent decision. The result is, first, that the testator's two sons, *James* and *Joshua*, took all the testator's *interest* in the premises devised to them, by force of the word "estate;" secondly, that nothing included in the "exception," did so pass; and, thirdly, that the daughters took, in every thing so excepted, the same interest as the testator had.

Wilde, in reply.—The word "estate" has a known legal meaning, and the question is, whether the testator is to be considered as not having used it in that meaning. Where a testator uses a definite legal expression, it would require very strong circumstances to induce the Court to put a different meaning upon such expression, in order to carry out the assumed intention of the testator. There is no decision that the heir can be disinherited, without express words of intention. The Court will probably not be disposed to extend the case of *Gall* v. *Esdaile* (*h*).

Cur. adv. vult.

Mellor, afterwards, in this Term, referred the Court to *Doe*, d. *Hickman* v. *Haslewood* (*i*), and *Doe*, d. *Pratt* v. *Pratt* (*j*).

Tindal, C. J., now delivered the judgment of the Court.—In the course of the argument in this case, the only question that has been made has been, whether, upon the proper construction of the will of *James Knott*, his daughters, *Martha* and *Alice*, took in fee or for life only.

The word *estate* in a will has been held, in a series of cases, at once so numerous and so uniform, to extend to the quantity of interest which the testator has in the land devised, that the general rule is laid down, that it shall carry a fee where the testator has a fee, unless the intention is broken in upon by other expressions in the will; clearly shewing, that it is intended to give it a more limited construction. And the cases shew that, in order to give it a restricted sense, it is not enough that it is accompanied by words which shew it to point also to local situation, or to make it referable to the *corpus* of the land devised. This appears from the instance so frequently referred to of the devise of "my *estate* at *Ashton*;" or, as it was stated by the Court, to be the same in legal construction, of "my *Ashton estate*," *Chichester* v. *Oxenden* (*k*); and again, the devise of "all my *estate*, lands, &c., called or known by the name of the *Coal Yard*, in the parish of *St Giles'*, *London*," *Roe*, d. *Child* v. *Wright* (*l*); in both which cases, the word *estate* was held to carry a fee. And, looking to the words of the will now

(*b*) 3 Moo. 565.
(*c*) 7 Taunt. 35; 2 Marsh, 359.
(*d*) 6 Cruise, Dig. 214.
(*e*) Roll. Rep. 368; 3 Bulst. 127.
(*f*) 1 Wils. 333.
(*g*) *Ut supra.*
(*h*) *Ut supra.*
(*i*) 6 A. & E. 167.
(*j*) 6 A. & E. 180.
(*k*) 4 Taunt. 176; 4 Dow. 92.
(*l*) 7 Ea. 259.

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before us, we think the devise to the testator's two sons, *James* and *Joshua*, of 'my estate that I now occupy, together with the factory, and all the edifices and appurtenances thereon," clearly falls within the general rule, and if there had followed no exception, would have carried a fee in the whole estate, with every building upon it, to his two sons. And we think the exception out of the devise, under which the daughters claim, does, by necessary intendment, carry the same quantity of estate as that from which it is excepted. Out of the devise to his two sons of the estate he occupies, the testator excepts "the house I now occupy, with the cottages *thereon*, occupied by *Clegg* and *Cleverly*, and all other conveniences *thereon*." And if a contrary construction should be adopted, and it should be held that, because the testator has used in the exception the words *house and cottages thereon*, he only intended an estate for life to the daughters, a similar construction ought to be put on the words of the devise to the sons, "with the factory and all the edifices and appurtenances *thereon*;" but this would lead to a consequence which seems contrary to the intention of the testator, namely, that the sons, *James* and *Joshua*, should take the fee in the estate he occupied, but only take an estate for life "in the factory and all the edifices and appurtenances thereon," which, upon their death, should go over to the eldest son and heir at law; whilst, under the same construction, the two devisees, *James* and *Joshua*, upon the death of their sisters, would take the house and cottages on the estate occupied by the testator in fee; a construction which appears to us to be unreasonable. But, looking at the devise generally, we think it amounts, in effect, to this—that he gives so much of the estate he occupied as he describes, to his two sons, and the remainder of the estate to his two daughters.

Some reliance was placed in argument upon the circumstance that, in a subsequent part of the will, the testator has devised to one of his sons, by the same word, *estate*, certain premises in which, he states in his will, that he had a leasehold interest only. The terms of that devise are, "that estate or tenement lying and being at *Hartshead*, occupied by *R. F.*, which I hold under lease from the Earl of *Stamford* and *Warrington*, during the term of my lease." But, as it appears manifest that, in this particular devise, the testator intended the word *estate* to carry the whole of the interest he had, we cannot draw the inference from it, that in the case where he uses that term in respect of lands which he holds in fee, the general meaning of the term is to be restricted to less than a fee. We therefore think, under this devise, that the two daughters took an estate in fee, and, consequently, that a *nolle prosequi* must be entered.

Judgment for defendants.

April 30.

ORAM *v.* PARKER.

Judgment was signed in *M. T.*, 1833. The plaintiff's attorney, in his bill of costs, had charged for entering the issue and judgment upon the roll, but, in fact, had done neither. The defendant wishing to enter up satisfaction on the roll, the Court, in *E. T.*, 1838, ordered the plaintiff's attorney to complete the issue and carry in the roll, but without costs.

THIS action was commenced in *Hil. Term*, 1833, and the plaintiff had recovered judgment in the following *Mich. Term*. The defendant had paid the damages and costs. The bill made out by the plaintiff's attorney

contained the usual charges for the entry of the issue, and judgment upon the roll; but in fact, no such entries had been made. The defendant, being desirous to have satisfaction entered up on the roll, had, on the 28th of *March*, obtained an order from Lord *Abinger* (sitting as vacation judge at chambers), that the plaintiff should bring in the roll at the costs of the defendant; but his Lordship had intimated that he would alter the order if it were shewn, to his satisfaction, that the plaintiff's attorney had charged for the entry. Lord *Abinger* did not, however, again attend at chambers.

Francillon thereupon had applied to this Court, upon an affidavit, stating the above circumstances, and obtained a rule *nisi* that the plaintiff's attorney should complete the issue, and carry in the roll, and pay the costs of the present application, and of the summons before Lord *Abinger*.

Martin shewed cause.—An entry of the issue is scarcely ever made, in fact; and, if not done in the first instance, the defendant has no right to call upon the plaintiff or his attorney to have it done after a lapse of two or three years. The costs of entering the issue are costs between attorney and client, and not costs between party and party; and the defendant has not shewn that he has paid anything in respect of such costs;

But the Court made the

Rule absolute, but without costs.

DYKES *v.* BLAKE.

May 10.

THIS was an action to recover 633*l.* 0*s.* 5*d.*, the amount of deposit and auction duty paid by the plaintiff to the defendant, an auctioneer, on the purchase of some property at *Camberwell*, put up for sale at *Garraway's* coffee house, in *London*, on the 20th *May*, 1836. At the trial, before *Tindal*, C. J., at the sittings for *London*, after *Hilary Term*, 1837, a verdict was found for the plaintiff, subject to the opinion of this Court, upon the following Case:

Previously to the time of the sale, printed particulars, with conditions of sale, had been issued to the public. The particulars thus issued, contained the following description of two lots (12 and 13): "Lot 12, the celebrated *Fountain Cottage* (describing it), let to *J. M. Gerothwohl*, Esq., upon an agreement for a lease for nine years, from *Midsummer*, 1833. The covenants in the agreement will be read at the time of sale. The purchaser of this lot will be entitled to a right of carriage and footway, 13 feet in width, over lot

By particulars of sale, lot 12 was described as a cottage, with a right of carriage and foot way over lot 13, as shewn upon a plan annexed to the particulars; and the lot was stated to be subject to liberty for the purchaser of lot 1 to come upon the premises to repair certain mains, drains, and sewers; lot 13 was described as "a first-rate building lot of freehold ground," and was stated to be "subject to the same rights of way and passage, and other rights and easements over the same, as are now enjoyed under the existing leases of the *Crescent* houses (comprised in other lots), and subject to a similar reservation for the purchaser of lot 1 in respect of the main, &c., as is made out of lot 12." It was also stated, that the lease of lot 7 (one of the *Crescent* houses), might be seen at the vendor's offices, and would be produced at the sale. The tenants of all the "*Crescent* houses" had, under their leases, a right of way across lot 13, which was *not marked in the plan*. By the 9th condition of sale, it was provided, that if any mistake were made in the description of the premises, such mistake should not annul the sale, but a compensation should be given. The plaintiff, having purchased lots 12 and 13, for separate sums, but by one contract:—*Held*; *first*, that the existence of the right of way was not sufficiently disclosed; *secondly*, that it was not a case for the application of the compensation provision; and, consequently, as both lots were purchased by one contract, that the plaintiff was entitled to rescind the whole of such contract.

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13, on the northern boundary thereof, as shewn upon the plan (*a*); bearing and paying one moiety of the expense of keeping the road in repair. This lot is supplied with water from lot 1, without any rent or payment for the same, and the purchaser will be entitled to have water supplied as heretofore from lot 1, until *Midsummer*, 1842, but not afterwards; and the lot is sold, subject to liberty for the purchaser of lot 1 to come upon the premises at all reasonable times to repair the main, laid from the reservoir in lot 1, and the drain and sewer in the same premises, in like manner as reserved in lot 7."

"Lot 13: *a first-rate building plot of freehold ground*, land-tax redeemed, called *Crescent Field*, lying between lots 10 and 12, enclosed from the grove by an ornamental iron fence, to which it has a frontage of 86 feet, besides another frontage of about 90 feet to the *Crescent Sweep*, as shewn upon the plan. *Unquestionably a fine situation for building as any in Camberwell;* together with the stable-yard and planted ground in the rear, including two small tenements. The entire site of this lot comprehends about one acre, be the same more or less. This lot will include the ground forming part of the *Crescent Sweep*, comprised within the boundary of lot 13, by the line running east and west upon the plan, *subject* for ever hereafter *to the same rights of way and passage, and other rights and easements over the same, as are now enjoyed under the existing leases of the crescent houses*, and subject to a similar reservation for the purchaser of lot 1, in respect of the main from the reservoir, and the drain and sewer, as is made out of lot 12."

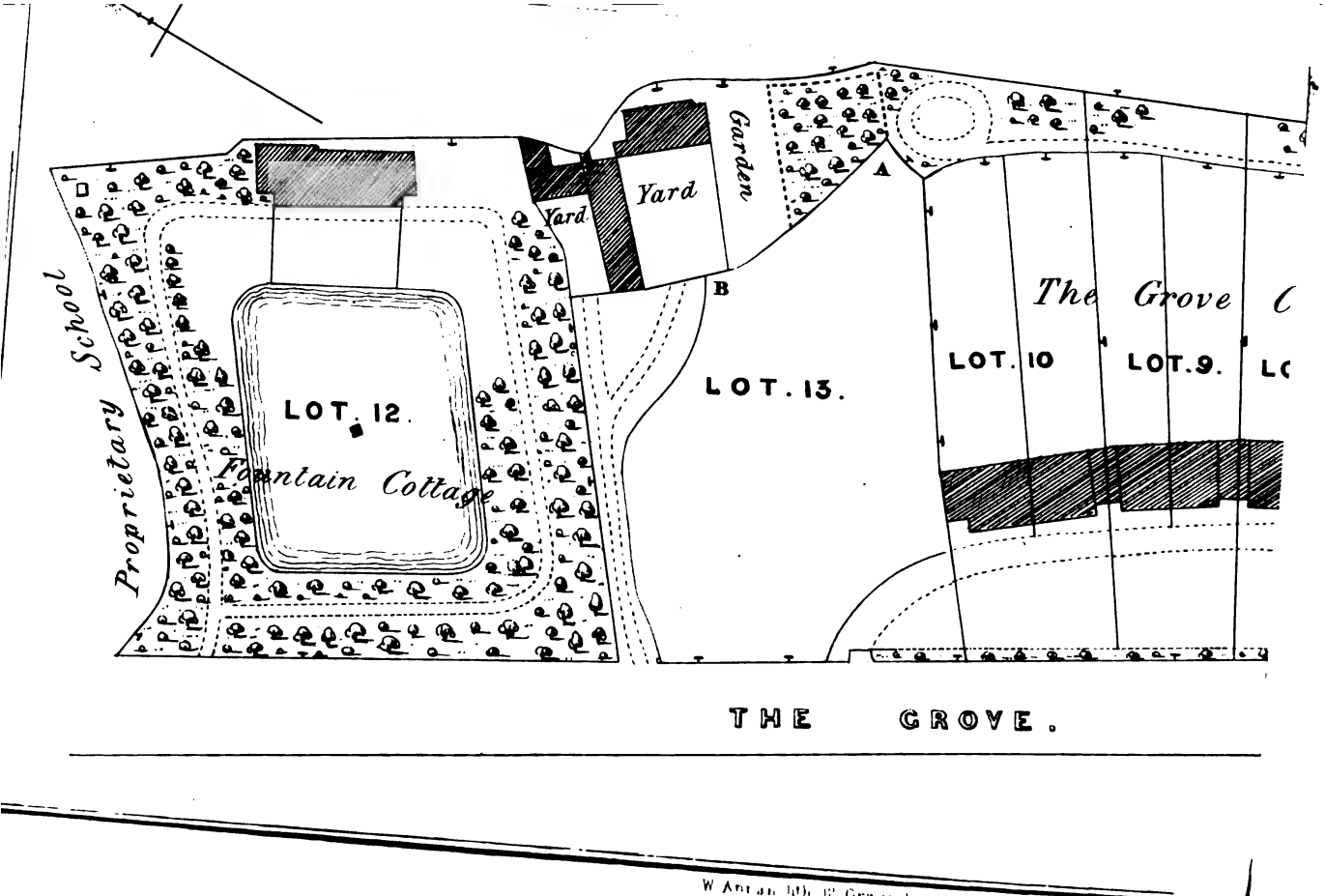
The reservation in the description of lot 7, referred to in the description of lot 12, was in the following words:

"This lot is to be supplied with water, as specified in the description of lot 1; and will include that portion of the ground next the grove, which lies in front of this lot, as shewn in the plan by the line drawn from east to west; and also that portion of the planted ground on the east side of the gardens of the crescent houses which lies in the rear of this lot, as also shewn on the plan by the line drawn from west to east, with the benefit for ever hereafter of the same rights of way and passage, and other rights and easements over the residue of the said ground next the grove, and the said planted ground in the rear, as are now enjoyed under the existing leases of the crescent houses, and on the same terms and conditions, subject, nevertheless, to corresponding rights and easements in favour of the other crescent houses, and to liberty for the purchaser of lot 1 to come upon the said planted ground at all reasonable times, to repair the main, laid from the reservoir of lot 1, and the drain running through the same ground, as shewn upon the plan, expressly referring to the sewers, drains, and watercourses, produced at this sale, making good any damage that may be sustained thereby. And the conveyance to the purchaser is to contain all proper reservations, covenants, and agreements for the above purposes."

The particulars of lot 7 described the two houses comprised in that lot as let on lease for twenty-one years, from *Midsummer*, 1826; the lease to be seen at Mr. *Gregson's* offices, and to be produced at the sale. The particulars of lot 8, stated the reservation as in lot 7, "and as shewn in the plan." The particulars of lots 9 and 10, referred to the plans in the same words.

The particulars issued contained both a plan of the lots, and a plan of the drains and sewers referred to throughout the particulars.

(*a*) See the plan annexed.


Proprietary School
LOT. 12.
Fountain Cottage
Yard
Yard
Garden
A
B
LOT. 13.
The Grove
LOT. 10
LOT. 9.
THE GROVE.
W Annan lith 12 Gracechurch

The plaintiff attended, and bid at the sale; lot 12 was knocked down to him for the sum of 1,300*l.*, and lot 13, for the sum of 1,600*l.*, making, together, the sum of 2,950*l.*; and a single contract of purchase for both lots, was signed at the foot of one of the printed particulars.

The tenants of all the eight houses, forming what are called the crescent houses, and delineated and described in the plan annexed as lots 10, 9, 8, and 7, had a right of way across lot 13, to the extent mentioned in the passage printed in italics in the following clause, which was inserted in the leases of all those houses; "also full and free liberty of ingress, egress and regress to and for the person or persons for the time being occupying the said messuage or tenement and premises, and his or their servants, workmen, and others in his or their company, or without; and to and for carriages and horses to him or them belonging, or by him or them retained or used, at all times during the continuance of this demise in, through, over, or upon the road made and leading to and being in front of the said messuages or tenements, from the gate placed next the grove at the north-west end of such road, to the gate placed at the south-west end thereof; and also full and free liberty of way, and passage to and for such person or persons for the time being occupying the said messuage or tenement and premises, and his and their respective families (not being servants) and friends, in, along, and over the walk of six feet wide, made and now being in the rear, and lying to the east of the ground inclosed by wire fences, as the garden ground, or ground to be occupied with such several houses; the same walk having been provided and set out as a promenade or walk for the use of the inhabitants of all the said houses and their respective families (not being servants), and extending from the north-east corner of the wall, inclosing the garden ground of the messuage or tenement hereby demised or intended so to be, to the south-east corner of the fence which incloses the garden ground in the rear of the southernmost of the eight houses; *and also full and free liberty to and for such person or persons for the time being occupying the said messuage or tenement and premises, and his wife, children and friends in their or one of their company to pass and repass on the path commencing at the end of the said walk, and leading to the stable-yard near thereto; and also full and free liberty to and for the servants of such person or persons so for the time being occupying the said messuage or tenement and premises, to pass and repass from the grove or stable-yard with gravel, earth, dung or compost, to be placed or used in the said garden, in hand or wheelbarrows, but not otherwise along and over the said way and path already made and leading from the grove to the said garden ground of the said messuage or tenement intended to be hereby demised.*"

The leases of the eight houses in the crescent were in the following terms: No. 1, for seventy years, from *Midsummer*, 1818, determinable by the tenant at the end of twenty-one years. Nos. 2, 3, and 4, for seventy-one years, from *Michaelmas*, 1817. Nos. 5 and 6, to yearly tenants. No. 7, for 21 years, from *Midsummer*, 1826, determinable at the end of fourteen years; and No. 8, for twenty-one years, from *Midsummer*, 1835, determinable by the tenant at the end of three, seven, or fourteen years.

The houses all face the grove. There is a carriage drive or sweep, forming, with the garden or plantation in front, a semi-ellipse, and this drive leads from the grove to the eight several houses.

There is a garden at the back of each of the eight houses. At the eastern

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extremity of these gardens, there is a gravel walk running from south to north, which is the walk of six feet wide mentioned in the leases. This gravel walk, together with the rest of the ground running from south to north at the back of the gardens, and extending northward to the field, forming part of lot 13, forms the promenade mentioned in the leases, and is common to all the eight houses forming the crescent.

The right of way, upon which the questions in this case arose, is exercised in respect of each of the eight houses, by going out of the gardens at the back of the houses, and along the gravel walk or promenade, and thence along the way or path described in the leases as already made, and which still exists across the field, which forms part of lot 13, into the road delineated in the plan, as running along the northern side of lot 13, and so along that road, either to the stable-yard, which also forms part of lot 13, or to the grove.

The said way or path runs across the said field at the eastern end of that field, nearly parallel to the boundary of the said stable-yard, which is at the eastern end of the said lot. There is a garden gate opening from the promenade into the pathway, at the letter A in the plan, and a hand gate opening from the pathway, at the letter B, in the plan, into the said road, on the northern side of lot 13.

The letters A and B, the *termini* of the path in question, were not on the plans annexed to the particulars issued as aforesaid, and there was not any delineation of that path on the said plans.

That portion of lot 13, over which the pathway extends, was, at the time of the sale, a grass field. At the time of the sale, the tenant of the house, which was the first house in the crescent next to lot 13, and which was one of the houses in lot 10, was also in the occupation of lot 13, as tenant from year to year, and the nearest access to the garden at the back of his house, and from the gardens of the other crescent houses to the field, was through the iron gate marked A.

The 9th condition of sale was, "That if any mistake be made in the description of the premises, or any other error whatever shall appear in the particulars of the present sale, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require."

Notice was given by the plaintiff, before the action was brought, that he would not complete the contract, on the ground that the same was void on account of the said right of way, and a demand was made upon the defendant for the deposit and auction duty, with interest, which was refused by the defendant.

The case was argued in *Hilary Term*, by

Wilde, Serjt., (with whom was *Walton*), for the plaintiff.—The plaintiff contends that his contract of purchase is altogether void, by reason of the concealment, on the part of the vendor, of the right of way across the premises, whether that concealment were wilful, or merely the result of negligence. There was nothing in the particulars and conditions of sale to lead the purchaser to suppose that such a right of way existed. Thus, the right of the occupier of lot 1, to come upon the premises and mend the main, was elaborately stated; the carriage sweep was mentioned; the right of way over lot 13 to lot 12 was mentioned, but no mention was made of the right of way

in question, (which was so detrimental to the value of the property as a building speculation), except in the vague and general expressions, "that the premises were subject to the same rights of way as were enjoyed under the existing leases of other houses." The plan, too was calculated to mislead, as no road was marked upon it; in short, there was nothing to awake the suspicion of even the most cautious, as to the existence of such an easement. If the present be considered a case of wilful misdescription, *cadit quæstio;* Duke of *Norfolk* v. *Wortny* (*b*); if one of mere accidental misstatement, still it is a misdescription in so material and substantial a point, that it may reasonably be supposed that, but for such misdescription, the plaintiff would not have entered into the contract, and therefore, he is entitled to avoid it; and the vendor will not be assisted by the clause in the particulars of sale, that "any error or misstatement" therein shall not vitiate the sale, but that a proportionate value is to be allowed by way of compensation; for the difference in value here is so uncertain and arbitrary, that no test for compensation can be applied; *Flight* v. *Booth* (*c*); *Tomkins* v. *White* (*d*); *Coverley* v. *Burrell* (*e*); *Dyer* v. *Hargrave* (*f*); *Sherwood* v. *Robins* (*g*). The case of *Wright* v. *Wilson* (*h*), may be relied on by the other side; the particulars of sale there contained a provision as to compensation, similar to the one in the present case: in the map referred to by the particulars, as containing the description of the estate, a turnpike road was set out immediately adjoining the premises; whereas, it turned out that there was no turnpike road within a quarter of a mile, and that what on the face of the map appeared as a turnpike road, was, in fact, a mere foot path; and it was held, at *Nisi Prius*, by *Parke*, J., that if the misdescription had merely originated in error, still, however gross the negligence of the vendors might be, they were entitled to recover the purchase money; as the purchaser must abide the event of having bought the estate without looking at it, and subject to such a condition as that in question. But that case, even supposing it to be law, would not govern the present; for there, the misdescription would have been obvious upon an inspection of the premises, which it would not be in this instance. Then, as the contract was entire for the two lots, the misdescription as to one lot will avoid the whole contract, and a court of equity would not compel a specific performance for one lot only; *Blagden* v. *Bradbear* (*i*); *Chambers* v. *Griffiths* (*j*); *Gibson* v. *Spurrier* (*k*); *Casamajor* v. *Strode* (*l*).

Wightman, (with whom was *Thesiger*, Q. C.), for the defendant.—There is no pretence for supposing this omission to have been a wilful deceit; and, as an accidental omission, it is provided for by the 9th condition of sale. The right of way was a mere easement, which the vendor was not bound to set out upon the plan, any more than if it had been a right to stack hay upon the premises: then there is an express reservation of "the rights of way and passage, and other rights and easements over the premises in

(*b*) 1 Camp. 340; and see *Jones* v. *Edney*, 3 Camp. 285.
(*c*) 1 Scott, 190; 1 N. C. 370.
(*d*) 3 Smith, 439.
(*e*) 2 Star. N. P. C. 295; 5 B. & A. 257.
(*f*) 10 Ves. 505.
(*g*) 1 Moo. & Mal. 194; 3 C. & P. 339.
(*h*) 1 Moo. & Rob. 207.
(*i*) 12 Ves. 466.
(*j*) 1 Esp. 150.
(*k*) Peake, Ad. Ca. 49.
(*l*) 2 Mylne & Keene, 706.

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question (lot 13), as were then enjoyed under the existing leases of the *Crescent houses*;" any man, therefore, of ordinary prudence and caution, ought to have inspected these leases before he entered into a contract of purchase; and his caution would have been the more alive, from the very fact of his seeing no roads or easements marked in the plan, to correspond with those referred to in the particulars; the plaintiff ought, at any rate, to have taken the pains to enquire what were the rights of way included in the leases mentioned.—[*Tindal*, C. J.—Were not the description and plan intended to save a purchaser the trouble of going to inspect the premises, or of making these enquiries? yours would be a dangerous doctrine, as applicable to the sale of distant estates.]—The plaintiff must take both the particulars and the plan together; and the former gave him information which ought to have set him upon enquiries: it is his own negligence that he has not done so. Then there is the provision for compensation, which certainly applies to such a case as the present, where the purchaser has the actual thing he contracted for; he can only rely, therefore, upon his right to compensation for any detraction to its value that may arise from a casual misdescription; *Wright* v. *Wilson* is expressly in point.—[*Park*, J.—I do not think that that case is to be taken as the deliberate judgment of my brother *Parke*; the case, it seems, was ultimately referred, and the opinion was only thrown out by him in argument.] At all events, the plaintiff can have no right to the deposit money for the other lot, as both lots were sold separately, for different sums, and formed the subjects of two distinct contracts, *James* v. *Shore* (*m*); *Poole* v. *Shergold* (*n*); *Lewin* v. *Guest* (*o*).

Wilde, in reply.—The plaintiff cannot be said to have the thing he contracted for; the particulars of sale speak of lot 13 as "unquestionably as fine a situation for building as any in *Camberwell*;" a purchaser buying it for that purpose, would find a right of way across it rather a hindrance to the completion of such an object. The present case is stronger than *Flight* v. *Booth*.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.—The question in this case is, whether the plaintiff is at liberty, under the circumstances stated in the special case, to hold the contract of purchase into which he entered to be altogether void, and to recover back the money paid to the auctioneer as money had and received to his use. And this will depend on the determination of two questions: first, whether the description of the premises in the printed particulars and plans exhibited at the time of the sale, upon the faith of which the plaintiff made his purchase, was such, that a prudent and vigilant man would enter into the contract, without discovering the existence of the right of way over the land comprised in lot 13; and, secondly, whether such right of way being found to exist, renders the purchase altogether useless, for the purposes for which it was made, or only brings it under the head *misdescription*, so as to form the subject of a compensation or equivalent under the 9th condition of sale. And, upon the first of these two questions,

(*m*) 1 Star. N. P. C. 426.
(*n*) 1 Cox, 273; 2 Bro. C. C. 118.
(*o*) 1 Russ. 325. See also *Seaton* v. *Booth*, 1 Har. & Wol. 742; 4 A. & E. 529.

we are of opinion that, looking at the printed particulars of sale, and the plans which accompany them and which are referred to by the particulars, there is no sufficient disclosure of the existence of the right of way to enable a bidder at the sale, by the exertion of ordinary vigilance and sagacity, to discover that such way exists.

Looking at the description of lot 13, given in the particulars themselves, it states that the lot will include the ground forming part of the *Crescent Sweep* coloured red upon the plan "subject for ever hereafter to the same rights of way and passage over the same as are now enjoyed under the existing leases of the *Crescent* houses." Now, in the first place, it is left in very great uncertainty, whether the rights of way and passage there spoken of are to be exercised only over the sweep before the *Crescent* houses, or whether they are meant to extend over other and more distant parts of the close. Admitting, however, the latter to be the proper, though it certainly is not the most obvious, construction, a reference to the other part of the particulars, so far from throwing any light upon the existence of the way now claimed, would tend to mislead the bidder at the auction. He would naturally refer for information to the description of the *Crescent* houses themselves, for the use of which this way is reserved. But the description of lot 7, so far from pointing at the way in question, mentions only the reservation of a right of way and passage over a different part of the premises, *viz.*, such rights of way over the ground "next the grove, and the planted ground in the rear, as are now enjoyed under the existing leases of the *Crescent* houses;" and in all subsequent lots, 8, 9, and 10, the particulars expressly state that these lots are sold with similar rights and privileges, and subject to similar reservations as lot 7, "and as shewn in the respective plans." Now, upon referring to the plan which is thus appealed to in the particulars, there is no trace whatever of any right of way over lot 13, for the use of the crescent houses, except the carriage sweep. There is, indeed, a way over the close for the use of lot 12, clearly marked upon the plan; the presence of which would add strength to the conclusion, that none other was intended to be reserved.

The only question, therefore, is, whether the exception in the description of lot 13, of the rights and easements now enjoyed under the existing leases of the crescent houses, coupled with the notice in the description of lot 7, that the lease and agreement might be seen at the attorney's offices, and would be produced at the sale, imposed an obligation on the bidder to refer to the lease itself; and we think, under the circumstance, it did not. Whatever might have been the case if the particulars had been confined to matters of description only, we think that, as there is a direct reference and appeal to the plan, and the plan, whilst it discloses one way altogether, omits any trace of the way now claimed, the bidder at the auction could not be bound, in the exercise of ordinary prudence and vigilance, to look further; that the inspection of the plan would lull all suspicion to sleep, and that it was calculated, not simply to give no information, but actually to mislead. Particulars and plans of this nature should be so framed as to convey clear information to the ordinary class of persons who frequent sales by auction; and they would only become a snare to the purchaser if, after the bidder has been misled by them, the seller should be able to avail himself of expressions which none but lawyers could understand or attend to. We, therefore, think upon the great head of enquiry, the existence of the right of way was not

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sufficiently disclosed to make it clear to persons of ordinary vigilance and caution, and that the contract is not binding on the plaintiff.

The second point is, does the misdescription become matter of compensation and equivalent only? The 13th lot is stated in the particulars to be "a first-rate building plot of freehold ground;" it is then described as having a frontage of eighty-six feet to the grove, and ninety feet to the crescent sweep. The purchaser, therefore, might fairly conclude, as the seller intended him to conclude, that he might purchase the whole lot for the purpose of building. But the direction of the way claimed would render the close altogether useless for the very purpose for which it was known to be purchased. And although it has been argued that the objection can apply, at most, to lot 13, and the purchaser of lot 12 can have no right to rescind that purchase by reason of the misdescription of the lot 13; we answer that, in this case, the seller has been contented to treat the two purchases as one contract, by entering into one agreement for the sale of both at once at the aggregate price; and, secondly, that the purchaser of lot 12, upon the facts of this case, may be reasonably understood to have purchased lot 12 in order that he might, by unity of seisin, extinguish the right of way over lot 13, which before belonged to lot 12, and thereby, render lot 13 more valuable as building ground; an object and purpose which is entirely defeated by the existence of the right of way above mentioned.

We, therefore, think the misdescription, however unintentional, has been such as to justify the plaintiff in saying that the lots which the seller is ready to convey, are not the lots which he purchased; and, consequently, that he may recover back, with interest, the sums paid to the auctioneer.

Judgment for the plaintiff.

THE END OF EASTER TERM.

(IN THE EXCHEQUER CHAMBER).

Exch. Chamber.

May 12.

DAVIES and WIFE, Demandants; LOWNDES, Tenant.

WRIT of error on a bill of exceptions to the ruling of the Court of *Common Pleas*, on the trial at bar of the above cause (*b*).

The exceptions were—that "the Chief Justice declared to the grand assize the opinion of himself and his companions, that the fine levied by *William Lowndes*, in 1784, operated as a bar to the claim of the demandants; and that the testator, by the words 'my right and lawful heir at law,' intended his heirs at law of the blood of the *Selby's*, which the said demandants, by their said count, did not claim to be; and with that direction and declaration, left the question of the requisition to the grand assize, having in such direction stated to, and informed the said grand assize, that to entitle the said demandants to a verdict in their favour, it was necessary the said assize should be of opinion that the said demandants had proved the descent of the demandant *Elizabeth*, as in the said count mentioned; and particularly, that the alleged will of *James Lloyd*, was his genuine will, and not a false or fabricated instrument; but that whatever opinion they formed as to the pedigree, still, by reason of the points at law aforesaid, their recognition ought to be for the tenant; and the said grand assize thereupon found a verdict for the said tenant. But, upon being requested by the said Chief Justice to say, first, whether they found that the demandant had established her descent, as in the said count mentioned, they declared they could not agree upon that; but that they found a verdict for the tenant generally."

The case was argued before Lord *Denman*, C. J., *Coleridge*, J., *Williams*, J., *Parke*, B., *Bolland*, B., and *Gurney*, B., in *Easter* Vacation, 1837.

Sir *W. W. Follett*, Q. C., for the demandants, argued; as to the *will*, that the construction put upon it by the Court below, was erroneous; as the words, "my right and lawful heir," did not necessarily mean heirs "of the blood of the testator."

As to the *fine* levied by *W. Lowndes*, in 1784—*First*, that it did not operate as a bar to the demandants, as *W. Lowndes* had no freehold in the premises at the time; for he must be considered to have been in possession at that time, as trustee for the heir at law, and therefore could not have claimed adversely to him, which it was necessary he should have done, in order to render the fine operative. *Taylor* v. *Horde* (*c*); *Doe*, dem. *Parker* v.

T. J. Selby, by will, dated 10 *August*, 1768, devised estates in fee in the following words: "*To my right and lawful heir at law*, for the better finding out of whom I direct advertisements to be published immediately after my decease, in some of the public papers." The estates were then made chargeable with the payment of the testator's debts, and of certain legacies, including some to a cousin by the mother's side (to whom he also subsequently devised an estate in fee). The will continued thus: "All which debts, legacies, &c. I do hereby order and direct to be paid *by the said heir at law, within twelve months after my decease;* but should it so happen that no heir at law is found, I do hereby constitute *W. Lowndes* my lawful heir, on condition he changes his name to *Selby;* and I give the estates, &c. to the aforesaid *W. Lowndes*, subject to and chargeable with all the legacies, &c. before mentioned." *W. Lowndes* entered upon the premises, and held manor courts as lord; certain parties afterwards appeared, and claimed as heirs at law of the testator; but their claims having been judicially disallowed, in 1781, *W. Lowndes*, by the name of *W. Selby*, levied a fine, with proclamations. A writ of right having been brought against him, he obtained a verdict. Upon error brought:—*Held*,

First, That the devise to the right and lawful heir at law did not require that such heir should be of the testator's blood (*a*).

Secondly, That *W. Lowndes* was in possession at the date of the fine, claiming in his own right; and that such fine was properly levied, and consequently that it operated as a bar.

But, thirdly, at the trial of the writ of right, the grand assize having been misdirected as to the construction of the will, and having found a verdict generally for the tenant, that a *venire de novo* must be awarded.

(*a*) Overruling the direction of the Court of Common Pleas. 1 Hodg. 125; 1 N. C. 597; 2 Sc. 71.

(*b*) See the case reported as in the last note.

(*c*) 1 Burr. 60, 78.

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Gregory (*d*); *Doe*, dem. *Burrell* v. *Perkins* (*e*); *Doe*, dem. *Davis* v. *Davis* (*f*).

Secondly, That it was also inoperative, as having been levied in the name of *Selby*, when the conusor's real name was *Lowndes*. (*Shep. Touch.* 8.)

And, *Thirdly*, that at any rate it ought to have been left to the grand assize to say with what intention the conusor had entered, and what was the quality of his possession.

R. V. Richards, for the tenant, argued—As to the *will*, that the direction of the Chief Justice was correct. He relied upon the judgments of Lord *Mansfield* and Lord *Loughborough*, in the cases of *Doe*, dem. *Wells* v. *Lowndes*, cited at the trial at bar (*g*).

As to the *fine*, that if there was a "right and lawful heir" of the testator, *Lowndes* was in possession adversely to him, and therefore the fine would operate, it being levied by the name by which he was then known; and that the objection raised, as to the intent with which the conusor entered, and the quality of his possession, not having been left to the grand assize, ought to have been taken at the trial; and it was too late to take it now.

PARKE, B., now delivered the judgment of the Court. This was a bill of exceptions, tendered to the Judges of the Court of *Common Pleas*, upon the direction of the Lord Chief Justice, in a writ of right, tried at the bar of that Court. In the view which we take, it might not be necessary for us to express a decided opinion upon all the points submitted, as on one short ground we think that there must be a *venire de novo*. But as the same points will probably again arise for discussion, and as they have been fully argued before us, it may be expedient for the parties, and not improper for us, to express at once the opinion we have formed upon them. Both parties claim under the will of *Thomas James Selby*, who died in 1772; the demandant, *Elizabeth Davies*, as the heir at law therein described, and the tenant, as the representative of *William Lowndes*, the devisee expressly named. The tenant further insisted upon the effect of a fine, with proclamations, levied in 1784, to which it was objected by the demandants, that it was inoperative, because the conusor had no freehold in the land at the time of levying it; and also because he had not levied it in his true name. The cause was decided in the Court below, upon two points involved in this statement, the construction, namely, of the devise and the force of the fine; and the grand assize has come to no finding upon the proof given by the demandant *Elizabeth*, in support of her pedigree. By the bill of exceptions, the demandants now object, in the first place, that a wrong construction has been put upon the devise, the terms of which are as follows:—"Next I give and devise to *my right and lawful heir at law*, for the better finding out of whom I direct advertisements to be published, immediately after my decease, in some of the public papers, all my manors, with the rights, members, and appurtenances thereto belonging; also all my capital messuage, known by the name of *Whaddon Hall*, and also divers parcels of land enclosed, arable and meadow, situate, lying, and being

(*d*) 2 A. & E. 14; 4 N. & M. 308.
(*e*) 3 M. & S. 271.
(*f*) 1 C. & P. 130.
(*g*) See 1 Hodg. 131, n., 132, n.; 1 N. C. 620, 622; 2 Scott, 79, n., 80, n.

in the parishes aforesaid, with all appurtenances thereto belonging; also all my chase, known by the name of *Whaddon Chase*, with all the deer-soil ground, together with timber and wood growing thereon; also all coppices of wood, being part of the same chase; also all that parcel of land, known by the name of *Whaddon Park;* also all my other farms, messuages, lands, hereditaments, and premises, situate, lying, and being in the several parishes of *Whaddon* and *Nash*, *Great Horwood*, *Little Horwood*, *Single Borough*, *Tottenhoe*, otherwise *Tatnall*, *Shenley*, *Mursley* and *Shaldon*, and *Bletchley*, in the county of *Buckingham*, with their and every of their rights, members, and appurtenances; to hold the aforesaid manor of *Whaddon* and *Nash*, capital messuage and messuages, farms, lands, tenements, and hereditaments, &c., with their rights, members, and appurtenances as before mentioned, to my heir at law, his heirs, executors, administrators, and assigns for ever, subject to and chargeable nevertheless with the payment of my just debts, funeral charges, bonds, annuities, and all legacies hereinafter mentioned." The testator then proceeds to give a great number of legacies, and amongst others 1000*l.* to his cousin *Temperance Bedford*, the daughter of the late Mr. *Arthur Bedford*, minister of *Shambrooke*, in *Bedfordshire;* 1000*l.* to *Elizabeth Page;* 1000*l.* to Mr. *Franklin*, and so on; which legacies he orders and directs to be paid by his heir at law *within twelve months after his decease*. And then he proceeds to say, "But should it so happen that no heir at law is found, I then do hereby constitute and appoint *William Lowndes*, Esq., of *Winslow*, in the county of *Buckingham*, and now major in the militia, my lawful heir, on condition he change his name to *Selby;* and I give the estates and all the manors before mentioned, together with all rights, hereditaments, members, and appurtenances before mentioned, to the aforesaid *William Lowndes*, subject to and chargeable nevertheless with all the legacies, annuities, debts, funeral charges, and other charges before mentioned." It is not necessary to read any more of the will than the portion already read. Upon these words the construction put by the Court below was, that the "right and lawful heir," meant the right heir of the testator, being also of the blood of the *Selby's*, which the demandant *Elizabeth*, who claimed through the wife of the great grandfather of the testator, did not allege herself to be. Upon consideration, we are of opinion that this construction is not warranted by the true principles of legal interpretation, the province of the Court being simply to ascertain the intention of the testator from what he has written. It has no right to add to, or detract from his language, but such matters only as are absolutely necessary to give that language its full operation, and which therefore may be considered as tacitly part of it, the Court may imply. If the Court steps beyond that line, if it adds any qualification or restriction not strictly necessary to give the words of the devise their full operation, and travels out of that interpretation, it substitutes a new will: if, merely on probable grounds, or a moral belief that the testator intended something which is neither expressly or impliedly written, we require further from such claimant that he should also shew himself to be of the blood of the *Selby's*, we impose an additional term, which the testator has not expressed, and which, at most, we only conjecture him to have wished to impose, from probable inferences drawn from other parts of the will. In the present case, there are circumstances from which it may be clearly inferred that the testator,

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by the term "right and lawful heir at law," meant, not any one who should be heir at law, but such heir at law as, but for the will, would have inherited the whole of his property, whether purchased by himself, his father, or grandfather; and that no one can claim under the devise who has not this qualification. To that extent we agree with the decision of the Court of *Common Pleas*. The demandant's heirship will apply itself, if we may so speak, to each class of the property indifferently. The only objection to the claim is, that she is not of the blood of the *Selby's*; but the testator has not required that in terms, nor is it a necessary implication from his language. The cases of *Doe* v. *Lowndes*, in *King's Bench* and *Common Pleas*, in the time of Lord *Mansfield* and Lord *Loughborough*, were naturally pressed on us in this argument. We entirely concur in the decisions then pronounced, and in the general reasoning on which they proceeded; but it was unnecessary then to decide the point now presented for judgment. The lessors of the plaintiff in neither case satisfied the necessary requisites of the devise. They could not have inherited all the property. Upon a careful perusal of the language used by those distinguished Judges, it will appear that the capability of taking all the property, as heir, was the leading principle on which they proceeded; and any expressions importing beyond this, that the heir must be of the *Selby* blood, were either used somewhat loosely, as being of equivalent import, or certainly they were extra-judicial.—The inferences to be drawn from the fact, that the testator did not know the person to whom he intended to take as heir; and that he did know, and has benefitted by his will, persons, who in a certain sense, might be his heirs, are equally favourable to the construction which we put upon the devise, as to that given it by the Court below; while the circumstance, that he requires the devisee *Lowndes* to take the name of *Selby*, raises, at most, but a weak probability in favour of the latter construction; for the heir might well be of the blood, and yet not bear the name of *Selby*. The grounds, however, on which we proceed, would preclude us from being governed by merely probable inference, even of much greater weight. We, therefore, think that this first ground of the bill of exceptions is sustained. But this construction of the devise would have been wholly unimportant, and would not have been a ground for awarding *venire de novo*, if the fine levied in 1784 were operative, and the questions arising upon it had not only been properly submitted to, but decided by the grand assize. The objections made on the argument, as to the validity of the fine, were three; *first*, that the conusor *Lowndes* had no estate of freehold at the time of levying it; *secondly*, that it was void, as not having been levied in the true name of the conusor; and, *thirdly*, that at all events these questions should have been submitted to the grand assize; it appearing, according to the form of the record at that time, as if it had been laid down as a matter of law upon the facts stated, that the fine was a conclusive bar; and after the argument, and on a careful consideration of the case, we were disposed to yield to the last objection, so far as relates to the question as to the nature of the conusor's possession; and to think that, although the circumstances stated in the bill of exceptions furnished abundant evidence from which the assize might have found, and ought to have been strongly advised to find, that *Lowndes* was in possession at the date of the fine, claiming in his own right, and as absolute possessor against all the world; yet still that this was a fact to be decided by

the assize, and had not, as appeared by the record, been submitted to them; though, if the report of the case in 1 *Bingham's New Cases*, p. 617 (*h*), is accurate, the question had, in truth, been most accurately left by the Lord Chief Justice. The exception that the fine was not levied in the true name of the conusor, appeared to us to be so framed as to raise a question of law only; namely, whether the fine was valid, because it was not levied in the true christian and surname of the conusor, although it was levied in the name which he had then assumed and used, and by which he was known. In that point of view, we thought the objection was clearly invalid: for the fine may, without doubt, be levied, nay, will most properly be levied, in the name by which the conusor was known at the time, although no royal licence or formal authority to change the name had been procured. Since the argument, however, the record has been amended, by order of the Court of *Common Pleas*, and the objection to which we were disposed to yield, that the question as to the character of the possession had not been left to the grand assize, has been entirely removed: but, unfortunately, there is still a difficulty, which appears to us to be insuperable. The assize have found their recognition generally for the tenant, and we cannot assume that they have decided in his favour the question so left to them. They may have found their verdict upon the direction of the Lord Chief Justice, as to the construction of the will, as they were bound, according to that direction, to have done, whatever their opinion might have been, on the question as to the fine; for he stated to them that the testator, by the words "my true and rightful heir at law," intended his heir at law of the blood of the *Selby's*, which the demandant did not claim to be; and that by reason of that point of law, as well as the bar from the fine, their recognition ought to be for the tenant. As we are unanimously of opinion, for the reasons above given, that this direction was wrong, we are under the necessity of awarding a *Venire de novo.*

(*h*) See also 1 Hodg. 130; 2 Scott, 102.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Term, 1 Victoria, 1838.

The Judges who sat in Banc this Term, were TINDAL, C. J., PARK, J., VAUGHAN, J., *and* COLTMAN, J.

DAVIS *v.* TUNNICLIFFE.

Common Pleas.

June 2.

An action having been brought against an indorser of a bill of exchange (which had been fraudulently negotiated), the Court ordered it to be given up to the acceptor, upon payment by him of the amount of the bill, and all costs of the action.

A BILL of exchange, drawn by *W. Edwards*, and accepted by *B. Kewell*, had been indorsed by the drawer, and transmitted, thus endorsed, to the defendant, for the purpose of handing it to the drawer's brother; but the defendant had fraudulently endorsed it over. The bill having been refused payment by the acceptor, the plaintiff brought three actions; one against the defendant as indorser, and the other two against other parties to the bill.

Wilde, Serjt. had obtained a rule, calling on the plaintiff to shew cause why it should not be referred to the Master, to ascertain the amount of principal and interest due to the plaintiff up to the 9th *May* instant, on the bill of exchange on which the action was brought, and to tax the plaintiff his costs of the action, and also of such other action or actions as might have been brought fairly and *bonâ fide* for the recovery of the amount of the same bill of exchange up to the said 9th of *May*; and why, upon payment of such amount of principal, interest, and costs, when so ascertained and taxed as aforesaid, all further proceedings in this action, and all other actions brought on such bill of exchange, should not be stayed, and the said bill of exchange delivered up to *B. Kewell*, the acceptor thereof; and why the plaintiff should not pay to the defendant his costs occasioned by this application to the Court, to be also

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taxed; and why such costs, when taxed, should not be deducted from the amount which might be found due to the plaintiff.

R. V. Richards shewed cause. He admitted that a great fraud had been practised by the defendant, and that *trover* might lie for the bill at the suit of the acceptor, *Goggerly* v. *Cuthbert* (*a*); *Evans* v. *Kymer* (*b*). But he contended the Court had no jurisdiction to make the order applied for in this case. There were disputes between prior holders of the bill, which ought to be settled before it was given up to the acceptor, as there was no action against him.

Wilde, insisted that the Court had jurisdiction to make the order; and that the acceptor, being willing to pay the bill, had a right to the possession of the instrument for his own security, *Hansard* v. *Robinson* (*c*).

TINDAL, C. J.—The only question in this case is, whether the Court has the power to order the plaintiff to deliver up the bill; and I entertain no doubt that the Court does possess such authority. The case of *Hansard* v. *Robinson* decides, that an action is not maintainable against the acceptor of a bill of exchange, unless the party bringing the action is ready to deliver up the bill. That case, therefore, is very strong, to shew that the plaintiff must be in a condition to deliver up the bill upon which he sues. But it is said, that in the present case, no action has been commenced against the acceptor, and that there are disputes to be settled between other parties, who are claimants to the bill; but with these disputes the plaintiff has clearly no occasion to interfere. The acceptor comes forward and says, "though I am not sued at present, I may be liable for the costs of actions against other parties to the bill, and therefore I am now willing to pay the amount of the bill, and all costs incurred up to this time, upon my having the bill given up to me." Ought not the Court to assist him in this? The property of the bill is, undoubtedly, in the acceptor; and it is admitted that there would be no answer to an action of *trover*, brought by him to recover its value; it would therefore, I think, be improperly limiting the power of the Court were we to refuse the rule prayed for, and drive the party to his action of trover. The rule, therefore, must be absolute; but the costs of the present application will be left to the Master.

PARK, J.—I am of opinion that former decisions fully support the view which has been taken by the Lord Chief Justice. In *Pierson* v. *Hutchinson* (*d*), an action was brought upon a lost bill, and the Attorney General, Sir *Vicary Gibbs*, who conducted the case for the plaintiff, cited a long passage from *Marius* (*f*) to show that an indorsee of a *lost* bill might recover upon it. But Lord *Ellenborough* was clearly of another opinion; though he drew a distinction between a bill which had been *lost*, and one which had been *destroyed*; considering, that in the latter case, an indorsee might recover, but not in the

(*a*) 2 N. R. 170.
(*b*) 1 B. & Ad. 528.
(*c*) 7 B. & C. 90; 9 D. & R. 860.
(*d*) 2 Camp. 211; S. C. (nom. *Pearson* v. *H.*) 6 Esp. 126.
(*e*) P. 19, fol. edit.

former, and for this sound reason; that a *lost* bill might be in the hands of a *bonâ fide* holder, who might maintain his action upon it against the acceptor. So in *Mayor* v. *Johnson* (*f*), where the plaintiff sued upon one-half only of a provincial bank note, the other half having been stolen; he was nonsuited. I am of opinion, therefore, that the rule must be made absolute.

VAUGHAN, J.—I feel some difficulty in making up my mind upon this question, as I am not aware of any case in which the Court has exercised such an authority as they are now called upon to do. The case of *Hansard* v. *Robinson* certainly does not go that length. There is no question as to what the equity of the case would be; namely, that upon payment of the amount of the bill and costs, the acceptor would be entitled to have the bill returned to him; but my doubt is, whether a Court of law can interfere to assist him in this matter. They clearly might suspend all proceedings on the bill, so as to enable the acceptor to apply to a Court of equity, where he would obtain relief; but I am not aware of any authority upon the express point, that a Court of law has the power to order the delivery up of a bill under such circumstances. I think, however, that such power may be inferred from the decisions which have been brought before us, and I am not therefore disposed to differ from the rest of the Court.

COLTMAN, J.—The difficulty in this case appears to me to arise from treating this as an application made by the defendant *Tunnicliffe*, whose title to the bill may be doubtful; and the Court therefore would probably pause before they made an order for the delivery of the bill to him. But it is clear that the present application is made, not for his benefit, but for the benefit of the acceptor. Now, although, generally speaking, a person who is not a party to the cause cannot appear, or in any way interfere in the progress of the suit, yet, where such a person is affected by the process, so as to be liable to heavy costs, there he has a right *pro interesse suo*, to come in and pray relief. Now, considering this as an application by the acceptor, I think there is no further difficulty in the case, jurisdiction being given to the Court by the action having been brought. If the acceptor had been sued, and had paid the bill, he could maintain trover to recover it. In this case he offers to pay it; and the process of the Court having been put in motion by the holder, I think the acceptor has a right to come in and ask for the bill upon these terms; for we are entitled to consider the holder merely as a trustee for the acceptor, when the latter has paid the bill, or is ready to do so. I think, therefore, the Court is fully justified in making the order required.

Rule absolute: the costs of the motion to be in the Master's discretion.

(*f*) 3 Camp. 324.

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June 5.

BOYD *v.* THE LONDON AND CROYDON RAILWAY COMPANY.

By a section in a local Act, incorporating a railway company, no action was to be brought against *any person* for anything done in pursuance of the Act, unless twenty days' notice should be given by *the party* intending to commence such action to the intended *defendant*:—*Held*, that the Company was included under the term "person," and entitled to notice, notwithstanding that, in numerous other sections, a distinction was made between "persons" and "corporations."

CASE for obstructing a carriage way. The defendants had pleaded Not Guilty only. The cause was tried before *Tindal*, C. J., at the last *Surry* Assizes. The plaintiff recovered a verdict, leave being reserved to the defendants to move to set it aside, on the ground that no notice had been given to the defendants, as required by the 179th section of the private Act (*a*) by which the Company was incorporated.

Kennedy, in last *Easter Term*, had obtained a rule *nisi* accordingly. He

(*a*) 5 W. 4, c. x. By sec. 179, "no action, &c., shall be brought, &c., against *any person* for any thing done or omitted to be done in pursuance of this Act, or in execution of the powers, &c., unless twenty days previous notice in writing shall be given by *the party* intending to commence such action, &c., to the intended *defendant*, &c. And the *defendant* in such action, &c., may plead the general issue, and give this Act and the special matter in evidence, &c."

By sec. 2 (the interpretation clause), "Where any word shall be used importing the singular number, such word shall be understood to include several matters as well as one matter, and *several persons as well as one person*, &c. And where the word *corporation* shall be used, the same shall be understood to mean any body politic, corporate, or collegiate, civil or ecclesiastical, aggregate or sole, unless it be otherwise specially provided, or that there be something in the subject or context repugnant to such construction."

By sec. 8, the company are empowered to take lands, &c., and it is declared that the Act shall be sufficient to indemnify *the* said *company and all other persons* for what they or any of them shall do by virtue of the powers thereby granted.

By sec. 156, *If any person, save and except the said company* and their agents, and other persons authorized by them, shall ride, &c., upon the railway, or any part thereof, any horse, &c., *every person* so offending shall forfeit 10*l.*, or be imprisoned, &c.

By sec. 171, *all persons and corporations* aggrieved by any order, &c., of the said company, and also *the said company and all other persons* and corporations aggrieved, may appeal, &c., and *in the case of an individual* appealing, certain recognizances are to be entered into.

By sec. 41, the costs of summoning a jury in certain cases, are directed to be defrayed by *the company*, and in case such costs shall not be paid *to the party* entitled to receive the same within a certain time, the same may be levied and recovered by distress and sale of any goods and chattels *of the said company*.

By sec. 90, eight *persons*, who shall be proprietors of fifty shares, shall be elected directors.

By sec. 125, the company are entitled to demand toll for every *person* conveyed in any carriage upon the railway.

(The foregoing sections were relied on by the defendant; the following by the plaintiff):

By sec. 26, the conveyance of copyholds is authorized to be made by *all persons* and *corporations* by the Act empowered to make conveyances of other lands.

By sec. 32, all *persons* and *companies* having any mortgage on lands, to be used for the purposes of the Act, shall convey to the company.

A similar distinction between *persons* and *corporations* is taken in a great number of the sections of the Act; among others, in sections 34, 35, 36, 43, 53, 56, 62, 109, 111, 112, 120, 123, 127, 134, 135, 150, 159, 162, 163, 171, 172, 174, 181, 193, 197, and 200.

argued that, in the 179th section of the Act (enacting that no action should be brought against any *person*, for anything done in pursuance of the Act, without previous notice, and giving the defendant the statutable plea of the general issue), the word "person" would include a corporation. Section 8, spoke of "the company *and all other persons*." In sec. 155, the expressions were "if any person, *save and except the said company*," &c.; shewing clearly, that the legislature contemplated the company under the term "person." By sec. 171, all persons and corporations aggrieved, &c., might appeal, and in the case of an *individual* appealing, certain things were required; which shewed that, where the legislature meant to draw a distinction between a person sole, and a corporation, they used the term *individual* to express the former. In *Co. Litt.* 2, a, it is said, "*Persons* capable of purchase are of two sorts; persons natural, created of God, as *J. S.*, *J. N.*, &c., and persons incorporate or politic, created by the policy of man, (and therefore they are called bodies politic), and these be of two sorts, *viz.*, either sole, or aggregate of many;" and the same definition is adopted in *Blackstone's Commentaries* (*b*). So the Statute of Mortmain (*c*), enacts, that "*no person*, religious or other, shall buy or sell any lands or tenements;" and subsequently provides that, "if *any* person, religious or other," offend against the Statute, the land shall escheat to the lord, and Sir *Edward Coke*, in commenting on the Statute, has the following passage: "If any sole corporation, or aggregate of many, either ecclesiastical or temporal (for the words of the Statute be, *si quis religiosus vel alius*), purchase lands or tenements in fee, they have capacity to take, but not to retain" (*d*); and again: "The said Statute of 7 *E.* 1, intended to provide against these decrees in these words: *Quod nullus religiosus, aut alius quicunque* (*i. e.*, other whatsoever of like quality of being, a body politic or corporate, ecclesiastical, or lay, sole, or aggregate of many) *terras*, &c." (*e*). By 21 *H.* 8, c. 13, *spiritual persons* are abridged from having pluralities of livings, and from taking of farms, &c.; the word *person*, there, must, of necessity, include *corporations*. By sec 4 of the Statute of Bridges (*f*), the justices are empowered to tax the *inhabitants* for the repairs of bridges, &c.; and Sir *Edward Coke*, in his comment thereon, says, "Every corporation and body politic, residing in any county, &c., or having lands or tenements in any shire, &c., are said to be inhabitants there within the purview of this Statute" (*g*). *Fisher* v. *The Thames Junction Railway Company* (*h*) was in point; that was an action brought against a company incorporated under a private Act of Parliament, which had been looked at with reference to the present case, and which was found to contain precisely the same clauses as those in the present Act. In that case an application was made by the defendants to plead the general issue, and other matters of defence; but the Court refused the application, holding that the general issue was sufficient; so that it was there assumed that the company was included under the term "person."—[*Tindal*, C. J.—The point does not appear to have been brought under the notice of the Court; it was passed over *sub silentio*.]—In *Wilks* v. *The Hungerford Market Company* (*i*), the

(*b*) B. 1, p. 123.
(*c*) 7 Ed. 1, st. 2.
(*d*) Co. Litt. 2, b.
(*e*) 2 Inst. 75.
(*f*) 22 H. 8, c. 5
(*g*) 2 Inst. 703.
(*h*) 5 D. P. C. 773.
(*i*) 2 N. C. 281; 1 Hodg. 281; 2 Scott, 446.

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defendants relied upon the private Act, 11 *G.* 4, c. lxx; by sec. 93 of which, "no action is to be brought against *any person* for any thing done in pursuance of the Act, &c., after six months after the cause of action shall have arisen:" the grievance complained of having continued from *April* 2d to *July* 2d, and the action not having been commenced before *December* 30th, it was held, that the plaintiff could recover only for the damage accruing in the two days (*July* 1st and 2d), included in the six months. The words of that Act were precisely similar to those of the present, except that in the former there was no interpretation clause. (He moved also upon two other points; that it was only a case for compensation, under the Act, and that the plaintiff, being a private individual, could not acquire a right of way over the company's property, which was given to them for public purposes; but the Court granted the rule upon the first point only.)

Platt, Q. C., and *Channell*, now shewed cause.—The passage from *Co. Litt.* 2, a, will be best understood by referring to the original in *Littleton*, to which that passage is a commentary; the original is, "*car si* home *purchase*," &c. (*j*); both *Littleton* and *Coke* are speaking of persons capable of purchasing, which *corporations* certainly can do. There is no doubt that the word "person," if coupled with the word "corporate," or "politic," would include a corporation; but it would not if it stood alone; as in common parlance, "a rose," would designate the natural flower, but "an artificial rose," explains that something else is meant. It is not to be gathered from any of the passages cited from *Coke* or *Blackstone*, that the word "person," used alone, would include artificial persons. Then the clause in question, being in restriction of the common law, ought to be restrained by exposition, as the rule was laid down by Lord *Nottingham*, in *Ash* v. *Abdy* (*k*). Some of the clauses to this Act, relied on by the other side, shew that the legislature could not mean the word "person" to include a "corporation:" *e. g.*, the 155th section enacts, that if *any person* (save and except the company, &c.), shall ride any horse upon the railway, any *person* so offending, shall forfeit 10*l.* or be imprisoned; now, it is clear that the company, in a corporate character, could neither ride on horseback or suffer imprisonment: the exception of "*the company*" therefore, must mean individuals of the company. There are numerous clauses in the Act, in which the terms "person" and "corporation" are put in opposition (*l*). In Statutes where the legislature intended that the word "persons" should include "corporations," they had expressly so stated in the Act of Parliament, as in the new Statute of Limitations (*m*); the *Fines and Recoveries Act* (*n*); and the *Tithes Commutation Act* (*o*). In the *Brighton Railway Act* (*p*), (which being in *pari materiâ* with the present Act, might be looked at to assist in construing it), the 253d section, (which is to the same purport as the 179th section of the present Act),

(*j*) Litt. sec. 1.

(*k*) 3 Swanst. App. 664.

(*l*) See note (*a*), *supra*.

(*m*) 3 & 4 W. 4, c. 27. By sec. 1 (the interpretation clause), "the word 'person,' shall extend to a body politic, corporate, or collegiate, and to a class of creditors, or other persons, as well as an individual."

(*n*) 3 & 4 W. 4, c. 74; by sec. 1, "the word 'person,' shall extend to a body politic, corporate, or collegiate, as well as an individual."

(*o*) 6 & 7 W. 4, c. 71; by sec. 12, "the word 'person,' shall mean and include the King's Majesty, and any body corporate, aggregate or sole, as well as an individual."

(*p*) 1 Vic. c. cxix.

enacts, that "no action, &c., shall be brought, &c., against any *person* or *corporation* for any thing done, &c., in pursuance of this Act, unless," &c.

TINDAL, C. J.—It appears to me, upon the proper construction of the Act of Parliament now under consideration, that the company incorporated by that Act are within the 179th section; and, consequently, that they are entitled to the advantages given by that section. There is no doubt that, in many parts of the Act, the words "person" and "corporation," are put in opposition; and in those instances, it is clear that the word "person" could not be intended to include "corporations;" but the question here is, not so much what may be the precise meaning of the term "person" in the Act generally, but whether, in the 179th section, that term can include a corporation. It must be observed, that this is not a clause empowering any act to be done; if it were, we should be driven to look to the interpretation clause; but, confining our attention to the 179th section, we find that it is thereby enacted, that "no action shall be brought against any person for any thing done or omitted to be done in pursuance of the Act, unless twenty days' previous notice shall be given by the party intending to commence such action to the intended defendant." The plaintiff in such action is designated by the term "party," and the company would, I think, come within the meaning of the term defendant, which is *nomen generalissimum;* the meaning of the term, defendant, being a party capable of being sued; and it is impossible not to see that, if the company were to be excluded from the benefits intended to be conferred by the 179th section, the very persons who most require a notice of action, would be deprived of it; as in the case of a stranger, a notice is not so necessary. I think, therefore, without intending to impugn the common law notion of the word "person," that we should not follow the real and manifest intention of the legislature, if we did not decide that the word "person," as used in the 179th section of this Act, was intended to include a corporation, and consequently, that the company, in this case, were entitled to notice under that section. The rule, therefore, will be made absolute.

PARK, J.—It is very distressing to the Court to be called upon to construe a long Act of Parliament, like the present, and to have to find a meaning where, in all probability, the legislature had none. As far as we can understand the Act under consideration, it appears that, in many clauses, the word "person," could not include a "corporation;" but, in the section immediately before us, there is no reason why it should not; and, as it is but just the company should have notice of action, we are fully authorised by the terms of the section, in considering such to be the intention of the legislature.

VAUGHAN, J.—It is no wonder that we should find considerable difficulty in interpreting an Act of Parliament containing no less than 206 sections. The clause in question, however, appears to me to have been especially intended for the benefit of the company, who are certainly more in want of its provisions than any other party; if we were to strike out the words "against any person." the whole section would be sensible and intelligible, and there could be no doubt that the term "defendant" would include

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a corporation. I agree, that we shall best promote justice in this case, by interpreting the word "person," used in the 179th section, to include the company; and therefore, the want of notice is an answer to the action, and the rule must be made absolute.

COLTMAN, J.—I think we are bound to see, if we possibly can, what the intention of the legislature was in the clause in question. The difficulty, however, as it appears to me, arises out of the interpretation clause, which, although it was obviously intended to facilitate the interpretation of the Statute, has introduced a good deal of confusion and uncertainty. The terms of that clause are wholly affirmative; there is nothing negative in it; and I think we are justified in extending the terms used in the Act, at least, to the full extent of the interpretation clause. An argument may be raised, that a word in an Act of Parliament can be used only in the sense given to it in the interpretation clause; but I do not think that such an argument is conclusive. It seems clear, that it was the object of the legislature to protect the company, and I think we do no violence to the language of the Statute, by deciding that the company are entitled to notice, under the 179th section.

Rule absolute.

(*Wilde*, Serjt., *amicus Curiæ*, referred to *Cortis* v. *The Kent Waterworks Company*) (*q*).

(*q*) 7 B. & C. 314; where it was held, that a corporation was liable to be rated under a local Act (47 G. 3, c. cxi), whereby commissioners were empowered to make rates upon all and every *person or persons* who held land in the parish.

June 11 & 12.

REYNOLDS and another, assignees of SHEPPARD, a bankrupt, *v.* WEDD, and another.

A trader, on being arrested by a creditor, (after having committed a secret act of bankruptcy), deposited the debt and 10*l.* for costs, in the hands of the sheriff, under 43 G. 3, c. 46, s. 2, which sum was afterwards paid into Court. Bail not having been perfected in due time, the creditor obtained an order for the payment of the money over to him, under the same Statute. A *fiat* of bankruptcy was subsequently issued against the trader:—*Held*, that the payment to the creditor was made under process of law, and was, therefore, protected against the assignees.

THIS was an action for money received, brought by the assignees of a bankrupt, to recover 420*l.* The defendants had pleaded *non-assumpsit* to all but 10*l.*, and payment into Court of that sum.

At the trial, before *Park*, J., at *Lincoln* Spring Assizes, the following facts were proved: On the 9th of *September*, 1837, *Sheppard* committed a secret act of bankruptcy; on the 10th, the defendants applied for payment of their debt, amounting to 410*l.*; on the 12th, they issued process of foreign attachment out of the *Boston* Court; but such process proving unproductive, on the 13th, they issued a *capias* against *Sheppard*, and he was arrested for the 410*l.*; on the 14th, he paid 420*l.* into the *Boston* Court, in lieu of bail, under the 43 *G.* 3, c. 46, s. 2 (*a*); on the 23d, *Sheppard*, having neither perfected

(*a*) Enacting "that all persons arrested upon *mesne* process shall be allowed, in lieu of giving bail to the sheriff, to deposit in the hands of the

bail, nor paid an additional 10*l.* into Court, pursuant to 7 & 8 *Geo.* 4, c. 71, s. 2 (*b*); the defendants applied to have the money paid out of Court, which after opposition, was granted, and the money was paid to the defendants accordingly. On the 28th, the *fiat* issued.

The learned judge thought, that this was a payment to the defendants under compulsion of law, and nonsuited the plaintiffs; reserving leave to them to move to set aside the nonsuit, and enter a verdict for 41*l.*

Balguy, Q. C., in last *Easter Term*, obtained a rule *nisi*, accordingly.

Wilde, Serjt., *Humfrey*, and *Waddington*, now shewed cause.—The defendants had a right to retain the money; they had no notice of the bankruptcy, which would operate only from the time of notice, and not from the time when the act of bankruptcy was committed. The money was in the possession of the law, and had ceased to be the property of the bankrupt; and therefore it could not be recovered by the assignees. If the money, instead of having been paid into Court, had been paid, upon the arrest, to the present defendants, no question could have arisen. The Statute of 43 *G.* 3, gives the defendants their title to the money, and they received it therefore under the sanction and authority of the law; the order of the Court, by which it was paid over to them, is equivalent to a judgment; they had, therefore, recovered the money by due process of law, and the assignees cannot recover it back again from them; *Belcher* v. *Mills* (*c*). The case of *Ferrall* v. *Alexander* (*d*), might be relied upon by the other side, where it was held that, under the Bankrupt Act, assignees were entitled to money which had been paid into Court under the 7th & 8th *G.* 4; but there, the plaintiff had no title to the money till judgment, and the application was made on the part of the assignees before judgment; in the present case, the money had been paid into Court under the 43 *G.* 3, by which the defendants (the plaintiffs below), were entitled to have the money out of Court, upon the failure of *Sheppard* (the defendant below), in not duly putting in and perfecting bail; and the money having been actually paid over to the defendants, upon motion, the Court would not interfere; *Hannah* v. *Willis* (*e*). The authorities, that a payment under coercion of law is valid against the assignees, are very numerous, *Price* v. *Beal* (*f*); *Andrews* v. *Spicer* (*g*); *Calvert* v.

sheriff the sum endorsed upon the writ, together with 10*l.* to answer the costs, and shall thereupon be discharged from such arrest; and the sheriff shall, at or before the return of the writ, pay into Court the money so deposited; and in case the defendant shall not duly put in and perfect bail, then the money deposited and paid into Court shall, upon motion, be paid over to the plaintiff, who shall be thereupon authorised to enter a common appearance."

(*b*) Enacting, that "where a defendant shall have been discharged from arrest upon making such deposit (under the above recited Act), and the sum so deposited shall have been paid into Court, it shall be lawful for such defendant, instead of putting in and perfecting special bail, to allow the sum so deposited and paid into Court, together with the additional sum of 10*l.*, to be paid into Court by such defendant, as a further security for the costs of the action, to remain in the Court, *to abide the event of the suit.*"

(*c*) 1 Gale, 142; 2 C. M. & R. 150.

(*d*) 1 D. P. C. 132.

(*e*) *Ante*, p. 117; 4 N. C. 310; 6 D. P. C. 417.

(*f*) 3 Keb. 231; S. C. nom. *Fym* v. *Benson*, Freem. 349.

(*g*) 3 Keb. 616. Mr. J. *Park*, upon these two cases being cited, observed,

Lingard (*h*); *Holmes* v. *Wennington* (*i*); *Cox* v. *Morgan* (*j*); and *Foster* v. *Allanson* (*k*). The following cases will probably be relied on by the other side: *Southey* v. *Butler* (*l*); *Cook* v. *Rogers* (*m*); and *Thornton* v. *Hargreaves* (*n*); but those were clearly cases of voluntary preference; *Harwood* v. *Lomas* (*o*), but in that case the debt, under which the money was paid by the bankrupt, was due upon a note which was not given *in the usual and ordinary course of trade* and dealing, within the meaning of the Statute, 19 *G.* 2, c. 32; *Hovil* v. *Browning* (*p*), where a creditor, for goods sold and delivered to a trader, who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the trader's, in the hands of a third person, and recovered judgment, in the Mayor's Court of *London*, against the *garnishee, who* thereupon paid him the amount of the debt so attached; afterwards a commission issued; and it was held, that this payment was not protected by the Statute 19 *G.* 2: but that case was expressly so decided, upon the ground that the Statute only protected payment made *by the bankrupt* himself; *Philips* v. *Hunter* (*q*), but there, an attachment was issued by a creditor against the bankrupt, not only with full knowledge of the debtor's having stopped payment, but even after a commission of bankruptcy had, in fact, issued; and even there, Lord C. J. *Eyre* differed in opinion from the other judges. In *Allanson* v. *Atkinson* (*r*), the money, which was held to be recoverable by the assignees from the creditor, had been paid over to him *by the sheriff*, as the proceeds of goods which the debtor had pledged, upon being taken in execution, after an act of bankruptcy. In *Teale* v. *Younge* (*s*), the doctrine, that a payment under arrest is protected, was considered, by the majority of the judges, as settled by the authority of the former decisions (*t*). It was formerly considered, that money paid under process of law might be recovered back by action; *Moses* v. *Macferlan* (*u*); but that case has long been overruled by numerous authorities, which are collected in

"Lord *Kenyon* once said, in my hearing, that he would not allow *Keble* to be quoted." See the opinions on this reporter, of *Burnet*, J., in *Batchelor* v. *Bigg*, 3 Wils. 330; of Lord *Hardwicke*, in *Pitt's* case, Ca. temp. Hardw. 100 (and note by *Ridgway*;) and of Lord *Mansfield*, in *Short* v. *Coffin*, 5 Burr. 2731.

(*h*) Cited 5 T. R. 200; 2 B & P. 399. See also 2 H. Bl. 335; and 7 Ea. 160.

(*i*) Cited *ibid:* and reported 2 B. & P. 399, n.

(*j*) 2 B. & P. 398.

(*k*) 2 T. R. 479. See also *Fuller* v. *Gibson*, 2 Cox, 24; and *Prickett* v. *Down*, 3 Camp. 131.

(*l*) 3 B. & P. 237.

(*m*) 5 Mo. & P. 353; 7 Bing. 438.

(*n*) 7 Ea. 544.

(*o*) 11 Ea. 127.

(*p*) 7 Ea. 154.

(*q*) 2 H. Bl. 402.

(*r*) 1 M. & S. 583.

(*s*) 1 M'Cl. & Y. 697.

(*t*) The question in this case, and in most of those previously mentioned, arose upon the wording of 19 *G.* 2, c. 32, s. 1, which enacted that no *bonâ fide* creditor of any bankrupt should be liable to repay to the assignees "any money, which before the suing forth of the commission, was really and *bonâ fide, and in the usual and ordinary course of trade and dealing*, received by such person *of any such bankrupt*," before notice that he was become bankrupt, or was in insolvent circumstances; but such questions are now set at rest by the 82d section of the present Bankrupt Act (6 *G.* 4, c. 16), which enacts, in general terms, that "*all payments* really and *bonâ fide* made *by any bankrupt, or by any person on his behalf*, before the date and issuing of the commission, to any creditor of such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy."

(*u*) 2 Burr. 1005; S. C. cit. Bul. N. P. 130.

a note to *Marriott* v. *Hampton* (*v*), in *Smith's Leading Cases* (*w*), all of which are in favour of the defendants.

Talfourd, Serjt., *Balguy*, and *N. R. Clarke*, in support of the rule.—The question here is, whether this case falls within the general rule, that the whole of a bankrupt's property vests in his assignees by relation to the act of bankruptcy; or within the exception to that rule, which protects payments made under compulsion of law. It is no doubt true, that where a matter has once been decided by a Court of competent jurisdiction, it is not in the power of the parties affected by such decision to open the question, although the decision may have been grounded upon a mistake; but to this rule there are exceptions; and the question here is, whether the present case falls within the principle of the rule or of the exceptions. The money here was paid out wrongfully, as regards the assignees; for the money had ceased to belong to the bankrupt, and vested in them from the time of the act of bankruptcy. Suppose the money had been paid, by mistake, to a stranger—[*Tindal*, C. J.—The Court would probably order it to be paid back again.]—Still, an action for money received would lie. Suppose money were paid by a debtor to a person assuming the character of the executor of his creditor, and afterwards probate were granted by the Ecclesiastical Court to another party; might *he* not sue for the money?—[*Vaughan*, J.—In *Allen* v. *Dundas* (*x*), it was held, that payment of money to an executor, who had obtained probate of a forged will, was a discharge to the debtor of the intestate, notwithstanding the probate was afterwards declared null, and administration was granted to the intestate's next of kin.]—Nevertheless an action for money received, might have been maintained by the administrator against the false executor. In this case, the Court has ordered *Sheppard's* money to be paid over to the defendant, when, in point of fact, they had no money of *Sheppard's* in their possession at the time.—[*Vaughan*, J.—Does not the plaintiff acquire an inchoate right to the money as soon as it is paid in?]—It appears not, from the case of *Ferrall* v. *Alexander*. *Belcher* v. *Mills*, is distinguishable from the present case; for the money was there paid out, not on the application of the defendant, but of the bail; and *Parke*, B., there appears to have thought, that the assignees had a title to the money; for he says, their remedy was against the attorney who paid the money over after the bankruptcy (*y*). The plaintiffs in this case have no such remedy. It is a fallacy to say, that any adjudication has taken place upon this question.—[*Vaughan*, J.—When a Court makes an order that money is to be paid over to a particular party, does it not, in fact, adjudicate thereon?]—As between the parties before the Court, perhaps the order may have that effect, but not so as to bind strangers. Besides, *Southey* v. *Butler*, and the rest of that class of cases referred to on the other side, *Balme* v. *Hutton* (in error) (*z*), *Carlisle* v. *Garland* (*a*), and *Groves* v. *Cowan* (*b*), are in favour of the plaintiffs.

(*v*) 2 Esp. N. P. C. 546, 7 T. R. 269.
(*w*) Vol. 2, p. 237.
(*x*) 3 T. R 125.
(*y*) 2 C. M. & R. 152.
(*z*) 1 C. & M. 262: 3 Mo. & S. 1; 9 Bing. 471; S. C. below, 2 Y. & J. 101; 2 C. & J. 19; 1 Tyr. 17.
(*a*) In *C. P.* 7 Bing. 298; 5 M. & P. 102. In *Cam. Scac.* 10 Bing. 152; 4 Mo. & Sc. 24; 2 C. & M. 31; 3 Tyr. 705. In *Dom. Proc.* 4 Bing. N. C. 7; 4 Scott, 587; 3 M. & W. 152.
(*b*) 3 Mo. & S. 352; 10 Bing. 5.

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REYNOLDS v. WEDD

TINDAL, C. J.—I consider this case to stand precisely on this footing, upon which it has been placed by the counsel for the plaintiffs: namely, that the question is, whether it falls within the general rule, that the whole of a bankrupt's property, at the time of the act of bankruptcy, vests in his assignees upon the issue of a *fiat;* or whether it comes within the exception to that rule, namely, that money paid by a trader, after a secret act of bankruptcy, under process of law, does not so vest: and I confess it appears to me, from the best consideration I have been able to give the present case, that it falls within the exception I have just mentioned. The material facts of the case are these: the defendant below commits a secret act of bankruptcy; he is afterwards arrested by the plaintiffs below (the present defendants), and pays a sum of money into Court in lieu of bail, under the Statute of 43 *G.* 3. He neither puts in and perfects bail, or pays in an additional sum of 10*l.* to abide the event of the suit, which he might have done under the 7 & 8 *G.* 4. The plaintiffs below, thereupon, as soon as he has made default, apply for, and obtain, an order for the payment of the money over to them, which they were entitled to, under the first-mentioned Statute, and the money is paid over to them accordingly; and it is not till after all these proceedings that the *fiat* issues. It appears to me, from a review of these facts, that the present case strictly ranges itself under that class, where a payment of money under a process of Court has been considered as protected against the claim of the assignees. The money here was paid under the 2d section of 43 *G.* 3, c. 46. (His Lordship here read the section.) At the time the payment is made, no fiat has issued, and *non constat* that there would be one. The plaintiffs below were the only persons who at that time had any claim to the money, the time for putting in and perfecting bail having expired. This Court has gone the length of saying, that when money was paid by the order of the Court, it was paid in discharge of the debt, and brought the transaction to a close: that was the result of *Hannah* v. *Willis*. I consider, therefore, this money, paid out under the authority of the Court, was completely within the statutory direction, and is, consequently, protected against the assignees. The case of *Ferrall* v. *Alexander*, which was relied upon on the part of the plaintiffs, as being in point, is distinguishable from the present. In that case, the writ was returnable in *Trinity Term;* the time for perfecting bail expired on the 4th of *June;* bail did not justify; and, on the same day, the defendant obtained a rule to pay money into Court in lieu of bail, under 7 & 8 *G.* 4, c. 71, s. 2; notice of trial was afterwards given; On the 13th of *July*, a commission of bankruptcy issued on an act of bankruptcy committed before the money was paid into Court; on the 26th, the assignment was made; on the 27th, notice was given to the plaintiff, that an application would be made to the Court to have this money paid out to the assignees; on the 28th, notice was given to the plaintiff that he might come in and prove his debt; on the 4th of *August*, the trial took place; and on the 20th of *October*, the defendant obtained his certificate; on the 2d of *November*, the assignees applied to the Court, before final judgment, to have the 70*l.* paid over to them. Now, it is to be observed that, in that case, there had been no default on the part of the defendant. The plaintiff had no right to go to the Court, and have the money paid out, until the defendant had made a default, or until final judgment. The defendant, also, had no right to the money, as (independently of his being bankrupt), he had made no appli-

cation before issue was joined; which, by the 3d section of the 7 & 8 *G.* 4, c. 71 (*c*), he should have done, and consequently his assignees were not entitled under that Act; but seeing that neither party was entitled to have the money paid out to them under that Act, the Court, exercising an equitable jurisdiction, decided that the money should be paid out to the assignees, under the general Bankrupt Act (*d*), as the money had been paid into Court after the act of bankruptcy. Now, in the present case, there is a clear default on the part of the defendant below, in not having put in and perfected bail; in consequence of which default, the plaintiffs below (the present defendants) were in a position to call upon the Court to exercise their statutable jurisdiction, and order the money to be paid out to them. The present case, therefore, strictly falls within the principle of *Belcher* v. *Mills*, though that case is stronger than the present. There the bankrupt was arrested by the defendants on the 24th of *September*, on which day he gave a bail bond; on the 1st of *October*, on the application of the bankrupt's attorneys, an order for time to put in bail until the 4th of *October*, was obtained, the plaintiffs being at liberty, in the meantime, to rule the sheriffs to return the writ, which they accordingly did, and the sheriffs returned *cepi corpus*; the bail were excepted to, and notice of exception was given on the 11th of *October*, and, on the same day, the sheriffs were served with an order to bring in the body; notice of justification was given for the 15th of *October*, and, on opposition, the bail were rejected on the ground of insufficiency; the *fiat* issued on the 14th of *October*, and on the 23d, the bankrupt's attorneys served a summons upon the defendants to shew cause, before a judge at chambers, why the proceedings taken upon the bail-bond should not be staid, on payment of debt and costs; the application was stated to be made on behalf of the bail, and an order was made, that the sum of 31*l.* 1*s.* 5*d.* should be paid to the defendant's attorney, by the attorneys of the bankrupt, which was accordingly done on the 27th of *October*: it was also proved, that the sum of 27*l.* had been supplied by the bankrupt himself to his attorneys, four days before the *fiat* issued, for the purpose of paying the debt and costs, the residue being paid by the attorneys out of their own pockets. There, the payment over to the defendants was made, not only after an act of bankruptcy, but after a commission had issued; but it was held, that the payment of the defendant, under the order of the Court, must be considered as the final determination of the Court. As I have already said, that was much stronger than the present case and must be governed by it, and consequently, this rule must be discharged.

PARK, J.—This is a case of considerable importance and difficulty, and has been very ably argued on both sides. I thought, at the trial, that the assignees must be nonsuited, and I am still of that opinion. The authority of *Marriot* v. *Hampton* will carry us through in our present decision. In that case, the defendant had brought an action against the plaintiff for goods sold,

(*c*) Enacting, that "it shall and may be lawful for the defendant, who hath made his election to make such deposit and payment as aforesaid, *at any time* in the progress of the cause *before issue joined* in law or fact, or final or interlocutory judgment signed, to receive the same out of Court, by order of the said Court, upon putting in and perfecting special bail in the cause, and payment of such costs to the plaintiff as the said Court shall direct."

(*d*) 6 G. 4, c. 16.

for which the plaintiff had paid, and obtained the defendant's receipt; but, not being able to find the receipt at the time, and having no other proof of payment, he was obliged to pay the money again; he afterwards found the receipt, and brought an action for money had and received, to recover back the money he had so paid; but Lord *Kenyon* was of opinion, at the trial, that the action would not lie, and the plaintiff was nonsuited; and, upon a motion for a new trial, the Court held that the nonsuit was right. In the present case, the money has been paid into Court under section 2 of the Statute, 43 *G.* 3, c. 46. Is the money, then, to lie in Court for ever? The defendant may get it back on perfecting bail; but the Statute expressly says, that in case the defendant shall *not* duly put in and perfect bail, the money paid into Court shall, upon motion, be paid over to the plaintiff. Here the money is paid in before the bankruptcy is known; and the bail, not being perfected at the time it ought to have been, the money was forfeited, and the Court, in the absence of any peculiar circumstances, was bound to order the money to be paid over to the plaintiffs below. Suppose a man were arrested, and, instead of defending the action, were at once to pay the money, such payment would be protected, as being made under compulsion; and the case appears to me to be the same here. The Court, under the circumstances, had no discretion as to making the order; and there is no fraud imputable to the present defendants. This case, therefore, comes within the principle of *Belcher* v. *Mills*, in which a payment was held to be protected under much stronger circumstances than those in the present case; for there the *fiat* had actually issued before the money was paid. I think we should defeat the intention of the Act of 43 *G.* 3, if we were to decide otherwise than that the present payment is protected, as against the assignees.

VAUGHAN, J.—I am of the same opinion, and think that the nonsuit in this case was very proper. The general proposition is not disputed, that, where a trader becomes bankrupt, and a *fiat* subsequently issues, all his property vests in his assignees, by relation to the act of bankruptcy. That principle has been carried to the furthest extent in the cases of *Balme* v. *Hutton*, and *Garland* v. *Carlisle;* but the question here is, whether there is not an exception to that general rule, and whether the present case does not fall within such exception. This is the case of a payment, made under the order of a Court having power to adjudicate upon the subject, and having, in fact, so adjudicated. I am not prepared to say, that the present case does not fall within the provisions of the 82d section of the Bankrupt Act, 6 *G.* 4, c. 16, although that seems to be doubted by my brother *Littledale*, in the case of *Ferrall* v. *Alexander*. (His Lordship here read the section. See *ante*, n. *t.*) If this, therefore, had been a payment by the bankrupt, instead of a deposit, it would have been protected under that section; but it is a deposit in the hands of the sheriff, paid afterwards into Court, which becomes forfeited by the default of the defendant; and I think that an inchoate right to the money attached to the plaintiff from the moment of its deposit. But the clear ground on which the present case may be decided is, that it is a payment under process of law. There is no distinction, for this purpose, between the Court at *Boston*, and the superior Courts at *Westminster*. The case of *Belcher* v. *Mills* is strictly applicable to, and is, indeed, much stronger than the present case, and the judgment of *Eyre*, C. J., in *Philips* v. *Hunter*,

is also strongly in favour of the defendants. Upon the whole, therefore, I think the nonsuit was proper, and the rule must be discharged.

COLTMAN, J.—It is impossible, I think, to distinguish the present case from that of *Belcher* v. *Mills*; and I see no reason to doubt the propriety of that decision

Rule discharged.

WILLIAM LLOYD and another, Demandants, and MARY NICHOLAS, Deforciant.

May 25.

The Court ordered the record of a fine, levied in 1830, to be amended, by endorsing the proclamations on the roll (where only one was entered), there being a minute in the foot, that all the proclamations had been duly made.

JOHN NICHOLAS, being seized of certain real property, in the county of *Carmarthen*, died intestate and without children; whereupon *Mary Nicholas*, the deforciant, being his cousin and heir-at-law, entered and received the rents, &c. In 1829, one *John Thomas* claimed to be entitled to the property, as maternal heir of *J. Nicholas*, and commenced proceedings in ejectment, which led, however, to no result; and *Mary Nicholas* remained in undisputed possession. At the Autumnal Great Sessions for *Carmarthen*, in 1830, she levied a fine *sur cognizance de droit, come ceo*, &c.; and by indentures of lease and release, bearing date the 17th and 18th of *August*, 1830, she conveyed the property in question to the use of the demandants, and their heirs in trust to sell; but no sale took place. She enjoyed the rents until she died, in 1837; having duly devised the property to *H. E. Shadwell*. *John Thomas*, being also dead, *David Thomas* claimed, as his nephew and heir at law, and commenced proceedings in ejectment, which also led to no result *Shadwell* had let part of the premises to *Lewis*, who had underlet to *Evans*; and *Lewis*, having given the latter notice to quit, he refused to acknowledge him as landlord, and put *David Thomas* in possession; whereupon *Lewis*, as lessor of the plaintiff, brought an ejectment against *D. Thomas*. Pending these proceedings, it was discovered that only the second proclamation of the fine levied by *Mary Nicholas* had been indorsed upon the roll. The secondary of the Court of Great Sessions for *Carmarthenshire*, who had the custody of the records of that Court before its abolition, and whose duty it was to have endorsed the proclamations on the roll, was dead. Under these circumstances,

Chilton, in last *Easter Term*, obtained a rule under 11 *G.* 4, & 1 *W.* 4, c. 70, s. 27 (*a*), calling upon *David Thomas* (the claimant), "to shew cause why the clerk of the peace of the county of *Carmarthen* should not be directed to endorse on the roll of fines, levied at the Autumnal Great Sessions

(*a*) Sec. 14 abolishes the jurisdiction of the Courts of Great Sessions in *Wales*. Sec. 27 enacts, "that the records, &c., of the several Courts abolished by this Act shall, until otherwise provided by law, be kept by the same persons, and in the same places, as before the passing of this Act; and that the Court of Common Pleas shall have the like power *to amend the records* of fines and recoveries passed in the Courts abolished by this Act, as if the same had been levied, &c., in the Court of Common Pleas. Provided that, in the case of the death of any such person, before any other provision shall have been made for keeping such records, &c., the custody thereof shall be with the clerks of the peace of the several counties to which the same shall respectively belong."

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for the said county, in the year 1830, all the proclamations made upon the above fine then and there levied, and also on the back of the writ of covenant, and other proceedings of the said fine, so as to perfect the said fine." He produced affidavits, setting forth the facts above detailed; together with one by an attorney, who had heard the first proclamation, and another by the crier, who had himself made the third.

E. V. Williams, in the same Term, shewed cause. He contended, *first*, that the Court had no power, under the Act, to order the amendment to be made; *secondly*, that even if they had the power, there was nothing to amend by, and there was only parol evidence of the proclamations having been made; and, *thirdly*, that the parties were precluded by *laches*. He relied upon *Fish* v. *Broket*, (*b*); *Pettus* v. *Godsalve* (*c*); *Ex parte Motley* (*d*); and referred also to *Oldnall's Practice of the Court of Great Sessions* (*e*).

THE COURT enlarged the rule till *Trinity Term*, in order that the roll might be produced for their inspection; and it was now produced accordingly, when it appeared that, on the foot of the fine, there was a minute that all the proclamations had been duly made; the foot, however, was only pinned to the roll, but it was verified by affidavit.

Williams again resisted the application; he argued, that it would be a great hardship upon the claimant, if the Court were to accede to this application; as he might have taken steps to assert his claim, after searching the records, and finding a fine without proclamation, which would only operate as a fine at common law. He cited *Hopwood* v. *Watts* (*f*), where the plaintiff, in 1828, recovered damages and costs, and final judgment was entered on the roll; but, according to a practice said to have prevailed for one hundred years, it was not docketed as required by 4 & 5 *W. & M.* c. 20, s. 2; and, on an application to the Court, in 1834, to order the judgment to be docketed, *nunc pro tunc*, they decided they had no power to make such order.

Chilton was heard in support of the rule.

TINDAL, C. J.—This is an application to the Court to supply a defect, occasioned by the misprision of the clerk, in not entering the several proclamations on the roll. It appears, from the affidavits, that it was the usual practice in the Court of Great Sessions, in that part of the country, that all the fines which were levied were put together, and that the proclamations were all entered on one fine, and were thence transcribed upon the others, whenever the officer was called upon to do so. On the back of this particular roll, we find only the second proclamation entered; but annexed to the roll, as it is produced in Court, is the foot, on which there is a minute entered of all the proclamations having been regularly made. It further appears, from the affidavits, that this was delivered to the ministerial officer, whose duty it was to enter the proclamations, as an authority to him to do so. Then there can

(*b*) Plowd. 265; S. C. Dy. 181, b.
(*c*) 13 Rep. 54.
(*d*) 2 B. & P. 455.
(*e*) A. D. 1814.
(*f*) 5 B. & Adol. 1056; 3 N. & M. 146.

be no doubt, looking at this minute, and the affidavit of the attorney who heard the first proclamation, and of the crier, who made the third, that this is a case of mere misprision, by which the parties to the fine ought not to suffer; and there is, I think, quite sufficient evidence to supply the deficiency. As to what has been urged, that the claimant may have been induced to defend the ejectment by having been deceived in consequence of the endorsement of the proclamation having been omitted, and been led to suppose that it was merely a fine at common law, it is sufficient to say, that the facts are not shewn to be so. The case of *Hopwood* v. *Watts* is distinguishable from the present; it was an application to allow a judgment to be docketed, *nunc pro tunc*, which would have affected a mortgage made after the judgment; but the third section of the Statute 4 & 5 *W. & M.* c. 20, is express, that "judgments not docketed shall not affect lands, as to purchasers or mortgagees;" the Court, therefore, could not grant the application without, in effect, repealing the Statute.

PARK, J.—I am of the same opinion. I was, at first, much struck by the case of *Hopwood* v. *Watts*, but, upon looking into it, I think it does not apply to the present case, for the reasons just stated by my Lord. As to this application, there does not appear to be any provision by any Statute as to the mode in which the entry of the proclamations should be made (*g*); and, as it sufficiently appears that all the requisite proclamations were, in fact, made, we ought, I think, to accede to the present application.

VAUGHAN, J.—I am of the same opinion. The simple question here is, whether we are satisfied that the omission of the endorsement of the proclamations was a mere misprision; and of that I think there is no doubt. *Hopwood* v. *Watts* is fully supported by the case of *Hickey* v. *Hayter* (*h*), which was decided more than forty years ago, and in which I was counsel; that was an action of debt against an administratrix on a judgment recovered against the intestate in his life-time, and the defendant pleaded *plene administravit*; she proved payment of specialty debts sufficient to exhaust the assets, but the plaintiff contended that his, being a judgment debt, ought to have been first satisfied; but, as the judgment had not been docketed, pursuant to the Statute of *W. & M.*, I contended, for the defendant, that the plaintiff's debt was not entitled to preference over any other debts; and I remember, that it was not without considerable reluctance, that Lord *Kenyon* came round to this view, which was ultimately adopted by the Court.

COLTMAN, J.—The argument that most struck me was, that we were asked to amend, having nothing to amend by; but as the foot of the fine is annexed to the record, and contains an entry of the requisite proclamations, that is, I think, quite sufficient. It does not appear to me that there is any hardship in granting the application.

Rule absolute; the costs of the application to be costs in the ejectment (*i*).

(*g*) *Williams*, during the argument, was asked by the Court, whether he could point out any such Statute, and he admitted he could not.

(*h*) 1 Esp. 313; 6 T. R. 384.

(*i*) See *Evans*, demandant: *Griffiths*, tenant; *Jones*, vouchee; 9 Bing. 311; 2 Mo. & S. 383.

Common Pleas.

June 2.

DOE, dem. GOODALL *v.* ROE.

Ejectment. Notice to appear in Trinity Term. Declaration of same Term.

MELLOR obtained a rule for judgment against the casual ejector in this case, where the notice was to appear in *Trinity Term*, and had been served before the Term, though the declaration was entitled as of the same Term.

June 2.

COUPLAND *v.* COOK.

Serving summons for time to plead, is a "fresh step," within R. G., H., 2 W. 4, s. 33.

HUMPHREY had obtained a rule *nisi* to set aside the service of notice of declaration filed, for irregularity; there having been no service of any previous proceedings.

R. Bayley shewed cause upon an affidavit, stating that, after the service of notice, the defendant had taken out a summons for time to plead, and served it upon the plaintiff; which, he contended, was a waiver of the irregularity; he cited *Williams* v. *Strahan* (*a*).

TINDAL, C. J.—That is clearly a "fresh step," within the *R. G., H.*, 2 *W.* 4, s. 33.

Rule discharged.

(*a*) 1 N. R. 309.

June 11.

CHARTER *v.* WALDGRAVE.

The Court will not give the plaintiff leave to sign judgment as for want of a plea, merely on the ground that a plea is no answer in law to the action. Nor where a plea is a discontinuance; but in such case, he must act upon his own responsibility

ASSUMPSIT for 20*l.* for use and occupation; money paid; and on an account stated. *Pleas*:—*First, non-assumpsit*, except as to 4*l.* 1*s.* *Second*, as to 3*l.* 12*s.*, residue of the sum claimed by the first count; and as to 9*s.*, residue of the sum claimed by the second count, making, together, the sum of 4*l.* 1*s.*; and as to 4*l.* 1*s.*, claimed by the last count, that they were identical; and, as to 2*l.* 5*s.* 6*d.*, parcel of the said sum of 4*l.* 1*s.*, payment after action brought. *Third*, as to 1*l.* 15*s.* 6*d.*, residue of the said sum of 4*l.* 1*s.*, that the defendant was resident in *Southwark*, and liable to be summoned for that amount to the Court of Requests there.

White applied for a rule, that the defendant should shew cause why the plaintiff should not be at liberty to sign judgment, upon the ground that the third plea was frivolous and a nullity. The *Southwark* Court of Requests is regulated by the Statutes 46 *G.* 3, c. 87, and 4 *G.* 4, c. 123 (*a*); by neither of which is a plaintiff debarred from suing, in the superior Courts, for a sum recoverable in the Court of Requests (*b*). The plea, therefore, was no answer

(*a*) See also 22 G. 2, c. 47; 32 G. 2, c. 6.

(*b*) See *Claridge* v. *Smith*, 1 Har. & Woll. 667; 4 D. P. C. 583.

to the action. If the plaintiff were to take issue on the facts, and go to trial, and the defendant were to recover a verdict, the plaintiff would be entitled to judgment *non obstante veredicto*. It is true he might demur, but the Court, in such a case, would not impose that necessity and delay upon him. *In Shadwell* v. *Berthond* (*c*), the Court held that, where a plea was so framed as that it might reasonably induce the plaintiff to consult counsel, in order to know how to deal with it, they would, on an affidavit that such plea was wholly false, permit the plaintiff to sign judgment as for want of a plea (*d*).

TINDAL, C. J.—In that case, the plea was false in fact. The defendant here does not produce any affidavit that he does not reside in *Southwark*. It is not enough to say, that the plea is no answer in law to the action (*e*); as that would apply to every case in which a demurrer would lie, and we cannot allow a demurrer to be argued on a motion.

White then argued that the two first pleas were a discontinuance, and applied for leave to sign judgment on that account.

TINDAL, C. J.—The defendant can sign judgment, if he thinks he can sustain it; but the Court cannot give him any advice upon the subject.

Rule refused.

(*c*) 5 B. & A. 750; S. C. (nom. *Shadbolt* v. *B.*) 1 D. & R. 446.

(*d*) See also *Body* v. *Johnson*, 5 B. & A. 751, n.; *Corbett* v. *Powell*, *Ib.*; S. C. 1 D. & R. 448; *Jones* v. *Studd*, 4 Bing. 663; 1 M. & P. 643; *Miley* v. *Wells*, 1 D. P. C. 648, *Acc.* But where, in an action against the drawer of a bill of exchange, he pleaded the delivery of twenty pipes of port wine in satisfaction, the Court refused to allow the plaintiffs to sign judgment as for want of a plea, although it was sworn that the plea was altogether false; *Smith* v. *Backwell*, 4 Bing. 512; 1 M. & P. 338.

(*e*) See *Cowper* v. *Jones*, 1 Har. & Woll. 642; 4 D. P. C. 591, *Acc.* See also *Prior* v. *Smith*, 1 Will. Woll. & Hodg. 65; 6 D. P. C. 299.

CHAPMAN *v.* WRIGHT.

May 26.

SLANDER, for the following words, spoken by the defendant to one *Day*, concerning the plaintiff: "Mr. *Chapman* (the plaintiff), has lived at his house two years, and has never paid more than ten or twelve shillings at a time for rent; he is considerably in arrears for rent, and if you move your goods in, they will be seized;" special damage, that the plaintiff lost the advantage of *Day's* becoming his lodger. The defendant pleaded the general issue, and a justification.

The case was tried before *Coltman*, J., at *Guildhall*, the Sittings before last *Hilary Term*, when the following facts were proved. The plaintiff and defendant were opposite neighbours. *Day*, seeing that apartments were to let *A.*, seeing that apartments were to let at a house occupied by *B.*, enquired who was the landlord, of *C.* (a neighbour of *B.'s*). *C.* told him, and added, that *B.* had not paid his rent, and that if *A.* moved in his goods, they would be seized. *B* having sued *C.* for slander, the judge, at the trial, told the jury "he thought it was a privileged communication by *C.*, unless they were of opinion it was made maliciously; that the question for them was, did the defendant honestly believe, at the time he spoke the words, that the statement contained in them was true, or was he actuated by malice in making such statement:"—*Held*, that there was no misdirection. But the Court granted a new trial, not being satisfied of the *fact*, whether *C.'s* statement were made officiously, or in answer to *A.'s* enquiries.

at the plaintiff's house, sent a boy to the defendant's to enquire who was the landlord of the house; upon which occasion the defendant made a statement in substance the same with that laid in the declaration; whereupon *Day* went himself to the defendant, when the latter spoke the words in question, in consequence whereof *Day* did not take the lodgings. The defendant offered no evidence in support of the plea of justification; but, relying upon the general issue, insisted that this was a case of privileged communication. The learned judge, in summing up, told the jury, that *he considered it was a privileged communication, unless they thought the defendant was actuated by malicious motives in making it;* and he also said, *the question for them was, did the defendant honestly believe, at the time he spoke the words, that the statement contained in them was true, or was he actuated by malice in making such statement?* The jury found a verdict for the defendant, expressly finding the statement had been made by him without any malice.

M. D. Hill, in *Hilary Term*, obtained a rule *nisi* to set aside this verdict, first, on the ground of misdirection; and, secondly, that the verdict was against evidence.

Humfrey now shewed cause, and cited *Kine* v. *Sewell* (*a*), and *Toogood* v. *Spyring* (*b*).

Hill and *Byles*, in support of the rule, cited *Smith* v. *Mathews* (*c*); *Martin* v. *Strong* (*d*); *Cockayne* v. *Hodgkisson* (*e*); and *Pattison* v. *Jones* (*f*).

TINDAL, C. J.—I think this case ought to go down to a second trial, upon the ground of the verdict being against evidence; as I am not satisfied, upon the evidence, that there was that absence of malice in the communication made by the defendant to *Day*, as to render such communication privileged: if it were a mere officious interference on the part of the defendant, or a voluntary communication made by him, it would not be protected; but if it turn out to be a statement made *bonâ fide* in answer to *Day's* enquiries, the case would be different. With regard to the supposed misdirection, though at one time I thought, that what had been said by the learned judge might have tended to obscure the jury; yet, upon reconsideration, as it appears he did no more than explain the law to them as he went through the evidence, and commented upon the facts, it cannot be said that there was any misdirection. The rule, therefore, will be absolute on the second point only.

The other judges concurring,

Rule absolute, accordingly.

(*a*) 3 M. & W. 297.
(*b*) 1 C. M. & R. 181; 4 Tyr. 582.
(*c*) 1 Moo. & Rob. 151.
(*d*) 2 Har. & Woll. 336; 1 N. & P. 29; 5 Ad. & El. 535.
(*e*) 5 C. & P. 543.
(*f*) 8 B. & C. 578; 3 M. & R. 101; 3 C. & P. 383.

KEOUGH'S BAIL.

Common Pleas.

May 28.

OGLE opposed the bail in this case. The affidavit of justification omitted the *number* of the residence of one of the bail, in violation of *R. G.* 1 *Will.* 4, r. 2; it stated, that the deponent was possessed of property, consisting of stock in the funds (describing it), standing in the names of deponent and another, but which the deponent swore he was solely entitled to, and which, he stated, was of the requisite amount "over and above his just debts." The learned counsel objected, that the description of this property was not sufficient, as being in violation of *R. G. H.* 2 *Will.* 4, 1832, r. 19, which required the deponent to state he was worth a certain sum, "over and above what would pay his just debts:" he also insisted, that the description of the property was insufficient.

Humfrey, in support of the bail.

COLTMAN, J. (the only judge in Court), held the two first objections good; but that the third was not maintainable.

Ogle then applied for the costs, citing *Jackson's Bail* (*a*).

Humfrey, contrà, cited *Stevens* v. *Miller* (*b*).

COLTMAN, J.—The plaintiff has not brought himself within the case of *Jackson's Bail*; he is entitled to be relieved from the costs of the opposition, but not to call upon the defendant to pay them.

Bail disallowed; no costs on either side.

An affidavit of justification of bail, stating, deponent was possessed of stock in certain funds (describing it), standing in the names of deponent and another, but which the deponent was solely entitled to:—*Held*, sufficient.

Such affidavit, however, being insufficient, by reason of its omitting to state the *number* of the residence of one of the bail (in contravention of R., T., 1 W. 4, s. 2), and also by reason of its stating that the deponent was worth the requisite amount *over and above*, (omitting *what would pay*), *his just debts* (in contravention of R. H., 2 W. 4, r. 19):—*Held*, neither plaintiff or defendant was entitled to costs.

(*a*) 1 D. P. C. 172. (*b*) 2 Mee. & Wels. 368.

OUTHWAITE *v.* CARR.

May 30.

PYKE moved for a *distringas*; the calls and appointments had been regular; the defendant's wife had told the party who went to serve the writ, that her husband was mad, and was in a public receptacle for lunatics; but, as the affidavit did not state that the deponent believed the defendant was purposely keeping out of the way,

THE COURT refused the rule.

An affidavit to obtain a distringas, must state that the deponent believes the defendant is purposely keeping out of the way.

Common Pleas.

May 30.

In an action by a builder, for work and labour in erecting a chapel, the Court refused him a rule to inspect the premises.

NEWHAM *v.* TATE and others.

IN an action for work and labour, by a builder, against the trustees of a Catholic chapel,

Wilde, Serjt., moved for a rule, calling on the defendants to shew cause why the plaintiff and his witnesses should not be at liberty to go over the premises, and inspect the work done thereon; the object of the application, he said, was to prevent great expence; and to obviate the necessity of calling a host of surveyors.—[*Park*, J.—Cannot the parties go there to divine worship?]—It might not be thought decorous if they went under such a pretext. —[*Park*, J.—Certainly not; but they might stay afterwards.]—That might be considered a trespass.—[*Vaughan*, J.—Then, you are asking the Court to make an order for you to commit a trespass. Have you any authority for the application?]—None exactly in point; but there was a case, in which the Court granted me a rule to prevent a party from using an agreement at a trial, which he had obtained improperly.—[*Tindal*, C. J.—Suppose the defendants keep the door shut; you will come to us to grant an attachment: could we grant it in such a case?—*Park*, J.—We do not like to issue what may be merely a *brutum fulmen*.—*Tindal*, C. J.—You had better see if you can find any authority to support you, and mention it to the Court again.]

Wilde, on a subsequent day, stated, that he had not been able to find any case in point; and the learned Serjeant, therefore, *took nothing by his motion*.

May 31.

A defendant demurred to the declaration, but omitted to insert a marginal note to the demurrer; the Court allowed him to withdraw his demurrer, upon the terms of his pleading issuably, and taking short notice of trial, upon payment of costs.

VERBEKE *v.* PEARCE.

ACTION on a deed, with an excuse for *profert*, that the deed was in the custody of the defendant's attorney; *demurrer inde*; but, as the defendant omitted to insert any marginal note to the demurrer,

Corrie obtained a rule *nisi* to set aside the demurrer, and sign judgment.

Wightman, for the defendant, craved leave to amend, upon payment of costs.

Corrie objected.

Per Curiam.—Upon payment of costs, let the defendant withdraw his demurrer, and plead issuably, taking short notice of trial.

BAILLIE *v.* KELL and another.

Common Pleas.

May 29 & 31.

The first count of a declaration in *assumpsit* stated a contract that the plaintiff should act as an accountant to the defendants, at a salary of 400*l. per annum*, ending on the 1st of *September* each year; and alleging, as a breach, the plaintiff's dismissal during a current year. The second count was an *indebitatus* count, for work and labour. The defendants pleaded (*inter alia*) first, to the whole declaration, the general issue; thirdly, to the first count, that they were induced to enter into the contract by fraud; sixthly, to the same, that the plaintiff had received monies without accounting for them, had made false entries in the books, and had disobeyed the reasonable commands of the defendants, whereupon they discharged him; and, to the second count, payment.

ASSUMPSIT. The *first count* stated that, upon the 7th of *April*, 1835, in consideration that the plaintiff, at the request of the defendants, had then become and was the servant of, and employed by, the defendants, as an accountant, at and for a certain yearly salary or wages, to wit, the salary of 400*l. per annum*, to be therefore paid by them, the defendants, to the plaintiff, and had then promised the defendants to serve them, the said defendants, in the capacity, and upon the terms aforesaid, until the 1st of *September*, in the year aforesaid, and so on afterwards from year to year, for so long as the plaintiff and defendants should respectively please, until the expiration of the current year of the service and employ of the plaintiff, commencing on the 1st of *September* in each year; the defendants promised to continue him in their service in the said capacity, upon the terms aforesaid, until the said 1st of *September*, in the year first aforesaid, and so on from year to year, for so long as the plaintiff and defendants should respectively please, until the expiration of the current year of the service and employ of the plaintiff, commencing on the 1st of *September* in each year. And although the plaintiff, confiding, &c., did continue in the service of the defendants, in the capacity and on the terms aforesaid, from the day and year first aforesaid, until the 1st of *September*, in the same year, and from thence for a long space of time, to wit, from thence to the 3d of *January*, 1837; and although the plaintiff was, on the day and year last aforesaid, and always afterwards, ready and willing, and then offered, to remain in the service of the defendants, in the capacity and on the terms aforesaid, for the remainder, and until the expiration of the then current year of his service, to wit, until the 1st of *September*; and although the plaintiff continued in the service of the defendants from the day first aforesaid, until the 1st of *September*, in the same year, and from thence until the 3d of *January*, 1837, yet, the defendants then discharged him, without any reasonable or probable cause, &c., by means whereof he hath been deprived of wages, salary, profits, &c., to a large amount, to wit, to the amount of 400*l.*, which he otherwise might and would have derived by being continued in the said service, and which the defendants have, from time to time, wholly refused to pay or allow; and the plaintiff has since been

At the trial, it appeared that a company was formed in *September*, 1834; when the plaintiff was appointed accountant, at 400*l.* a year; that, in the summer of 1835, the defendants became shareholders; that, in the following *December*, the concern being in a very bad state, the plaintiff concocted a fraudulent report, and made false entries in the books as to the profits; that the fraud was afterwards discovered, and a committee was appointed to investigate the matter; that, in *December*, 1836, the plaintiff, who had already received 180*l.*, sent in a claim for 750*l.*; whereupon the committee wrote to him that he must abandon his claim, before they could consider what remuneration he was entitled to; the plaintiff did not answer this letter, or one or two others which the committee wrote to him, and they complained of his disrespect; he refused, however, to abandon his claim; and on the 3d of *January*, 1837, the committee dismissed him.

Held; *first*, that the plaintiff was entitled to the verdict on the third plea, as there was no evidence of any fraud in the inception of the contract.

Secondly, that the defendants were entitled to the verdict on the sixth plea, as it was sufficient to prove any one of the allegations of misconduct, in order to support that plea; and it was a question for the jury, whether the plaintiff had been discharged on the ground of the misconduct proved at the trial, or for the disrespect of which the committee had complained, and they were justified in finding the former.

Thirdly, that, under the general issue, it was competent to the defendants to shew that the services, for which the plaintiff claimed remuneration under the common count, were worthless.

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wholly unemployed, and is likely so to continue. *Second count:* that the defendants were indebted to plaintiff in the sum of 2,000*l.* for wages and salary, and for services before then done and performed by him as accountant to a certain company of persons, carrying on business by and under the name, style, and firm of the *Essex Marine Salt Company*, for the defendants, and at their request.

Pleas; First (to the whole action), the general issue. *Third* (to the first count), that the plaintiff caused and procured the defendants to promise, as in the said count alleged, and that they were induced to make the promise *through*, and by means of, the *fraud, covin, and misrepresentation of the plaintiff*, and others in collusion with him; *Verification. Sixth* (to the same), *that the plaintiff*, in the way of his service and employment as such accountant, *received divers sums* of and from divers and very many persons, for and *on account of the defendants, which* said monies *he*, the plaintiff, *did not*, nor would, duly and properly *account for* to the defendants, although he was then, and often afterwards, requested by the defendants so to do; *and* he, the plaintiff, then also wrongfully, improperly, and wilfully, *made divers wrongful and improper payments* with other monies of the defendants, *and* then also *made divers* and very many *false, fraudulent, and improper entries in divers books* and accounts of, and belonging to, the defendants; *and made* and rendered divers *false, fraudulent, and fabricated accounts of payments* pretended to have been made, and other matters and things pretended to have been done by him, but which, in fact, were not made or done; *and* he, the plaintiff, then also *made divers false, fraudulent, and fictitious representations* to the defendants, of divers matters and things pretended to have been done by him, but which, in fact, were not made or done; and of divers other matters, &c., relating to businesses and transactions in which he was engaged as accountant. *And* he, the plaintiff, *also misbehaved and misconducted himself* in the service of the defendants in *this, to wit, that he wilfully and improperly refused to obey the just and reasonable commands of the defendants; and that* all and every of *the accounts kept*, and things done *by the plaintiff, were* so incorrectly, unskilfully, and improperly kept and done, that the same, and every part thereof, were *utterly useless*, and of no value whatever to the defendants; *and the plaintiff was* always, from the time of making the said promise of the defendants, in the first count mentioned, until, and at the time of the discharge of the plaintiff, *wholly unfit*, incompetent, and unable *to perform the duties of* such *accountant*, and totally unfit to act in the capacity; whereupon they, the defendants, when, and as soon as they discovered the premises aforesaid, to wit, on the 3d of *January*, 1837, refused to suffer or permit the plaintiff to continue any longer in their service or employ, and discharged him therefrom; and from thence, hitherto, have refused to retain or continue the plaintiff in their service, as it was lawful for them to do, for the cause aforesaid; *Verification. Seventh*, (to the *second* count), payment of 180*l.*

The plaintiff, in his *replication*, joined issue upon the first, second, and fourth pleas; and traversed the third, fifth, seventh, and eighth. To the *sixth* plea, he replied *de injuriâ*.

The cause was tried before *Tindal*, C. J., at *Westminster*, the Sittings after last *Hilary Term*, when the following facts were proved: the defendants were two shareholders in the *Essex Marine Salt Company*, which was established in *September*, 1834, with a board of directors and various officers;

one *Pooley* appeared as the managing director; one *Ames* was appointed secretary, and the plaintiff was appointed accountant, with a salary of 400*l.* *per annum*. The defendants became shareholders, one in *April*, and the other in *July*, 1835. In the following *November*, the affairs of the company being in a very bad condition, it was agreed, between *Pooley* and *Ames*, and the plaintiff, that a fictitious report of the state of the concern should be drawn up and published, and that a dividend should be paid to the shareholders, as arising from the profits of the manufacture of the salt, but which, in reality, was to be paid out of the funds in the hands of the company: a report was accordingly drawn up, representing the great success of the concern, notwithstanding various obstacles; stating that certain works had been purchased and put in operation, that new works were in progress, and that 735 tons of salt had been manufactured and sold, producing a net profit of 1,177*l.* 13*s.* 9*d.*: the whole of which was untrue, from beginning to end. The report then proceeded to propose a dividend of 7½*l.* *per cent.* on the instalments already paid. On the 29th *December*, this report was presented by *Pooley* to the board; whereupon the directors passed a resolution to advertise the before-mentioned dividend, payable on the 8th of *January*, 1836. In the mean time, one *Gould* became a shareholder to a large amount, and paid 1,080*l.* for his shares, but this sum was kept out of the books. The dividends were duly paid to the defendants and other shareholders, and, on the 12th of *February*, the plaintiff paid into the bankers' the sum received from *Gould*, as to the credit of salt manufactured, and a similar entry was made in the books. On the 28th of *March*, some of the directors went to inspect the works, and then, for the first time, the whole fraud was discovered. On the 2d of *April*, the plaintiff attended the board, and disclosed all the circumstances. Further investigations took place, and, in *November*, the whole concerns of the company were placed under a committee of management, and a new secretary was appointed in the place of *Ames*. On the 8th of *December*, the plaintiff, who had previously received 180*l.* on account of his salary, wrote to the committee, claiming the sum of 720*l.* as then due to him. On the 13th of *December*, the secretary enclosed him a resolution of the committee, that it was their opinion, that the plaintiff should abandon his claim for salary, before they could take into consideration what remuneration should be made to him. The plaintiff having returned no answer, the secretary wrote to him on the 20th of *December*, requesting, in the name of the committee, to have his reply by their next meeting, on the 23d. This letter being also unanswered, the secretary, on the 24th, enclosed him the following resolution, passed at the meeting held on the day before:

"It is the opinion of this meeting, that Mr. *Baillie*, by not replying to the letters of the committee of 13th and of the 20th instant, has treated the same with disrespect, and that, unless his answer is received by the next board-day, the 27th instant, the committee will act irrespective of his former appeal to them."

To this the plaintiff wrote an answer, saying, he was ready to meet the views of the company, as far as it could be done consistently with mutual interests; but he trusted they would not press a relinquishment of his claim, until he was prepared with their intentions towards him, as to past and future interests. Some further communication took place, and the plaintiff,

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still refusing to abandon his claim, the following note was forwarded to him by the secretary, on the 3d of *January*, 1837:

"Sir—The general meeting of the shareholders, assembled this evening, have instructed me to inform you, that they do not stand in further need of your services. They have also appointed the following gentlemen (naming them), to receive any communication you may be inclined to make.

"Your's, &c."

The plaintiff soon afterwards commenced the present action.

It was also proved, that he had done nothing, during the period of his services, but keep the accounts of the company, which were necessarily of a very limited nature.

The jury returned a verdict for the defendants; expressly finding, that the defendants had been induced to become shareholders by fraud.

Butt, in *Easter Term*, obtained a rule *nisi*, to enter a verdict for the plaintiff as to the third and sixth pleas to the first count, and generally, as to the second count; or for a new trial, on the ground, that the verdict was against evidence. He contended, there was no evidence to support the allegation in the third plea, that the defendants had entered into a contract with the plaintiff through fraud on his part, in collusion with others. As to the sixth plea, the plaintiff, by his replication of *de injuriâ*, had put in issue all the allegations in that plea, which were put forward as the reasons for the plaintiff's discharge; the defendants, however, had proved only a very small portion of the charges alleged against the plaintiff; and it would be a great hardship on him if the verdict were to stand against him upon this plea, as a party might publish that the plaintiff had been guilty of all the offences charged in the plea against him, and might, if the plaintiff sued him for the libel, plead the judgment in this action. He relied on *Timothy* v. *Simpson* (*a*); and distinguished the present case from *Cohen* v. *Huskisson* (*b*); *Spilsbury* v. *Micklethwaite* (*c*); and *Wood* v. *Bridden* (*d*). The plea cannot be taken distributively, like a plea of payment or set-off, *Cousins* v. *Paddon* (*e*).

Secondly, as to the second count, which must be considered as if it stood alone, he urged, there was no plea to let in the question of fraud; it should have been specially pleaded, as being in confession and avoidance; *R. G., H.* 4 *W.* 4 (*f*); *Potts* v. *Sparrow* (*g*); and that the plaintiff, therefore, was entitled to a verdict on that count. (He also moved upon affidavits of surprise, but nothing turned upon them.)

Talfourd, Serjt., and *Hoggins*, now shewed cause.—The defendants were at liberty, even under the general issue, to contend, that they were no parties to the contract; it was not like the case of *Potts* v. *Sparrow*, where the *illegality* of the consideration was sought to be set up. Here, it was sought

(*a*) 1 C. M. & R. 757.
(*b*) 1 Mur. & Hurls. 150; 2 M. & W. 477.
(*c*) 1 Taunt. 146.
(*d*) Hob. 119.
(*e*) 1 Gale, 305; 2 C., M., & R. 547; 5 Tyr. 818; 4 D. P. C. 488.
(*f*) *Pleading Rules. Assumpsit*, 3.
(*g*) 1 Hodg. 135; 1 Bing. N. C. 594; 1 Scott, 578; 3 D. P. C. 630.

to affect the defendants as shareholders, and it was competent to them to say, "*non hæc in fœdera veni*;" if they were *bonâ fide* shareholders, they would be liable; but they were not; as they were induced to take shares by fraud, to which the plaintiff was a party.

With regard to the sixth plea, *Spilsbury* v. *Micklethwaite* is an authority to shew that, where a plea consists of two facts, either of which would be a defence to the action, if one of those facts be proved, it will be sufficient to support the plea (*h*); in this case, quite sufficient was proved to justify the plaintiff's discharge.

As to the second count, it was open to the defendants, under the general issue, to shew, that the services which the plaintiff contracted to perform, had not, in fact, been rendered; *Allen* v. *Cameron* (*i*); *Street* v. *Blay* (*j*); *Chapel* v. *Hickes* (*k*).

Wilde, Serjt., and *Butt*, in support of the rule.—As the defendants became shareholders in the summer of 1835, they could not have been influenced in so doing by the fraud, which did not take place till the following *December*, as there was no fraud in the original formation of the company; and, having become partners, they adopted the engagements of the company as to servants and other matters. The plaintiff, moreover, was continued in his situation after the fraud was discovered. The fraud may have been a ground for dismissing him, but it will not vitiate the contract *ab initio*. The real ground of the plaintiff's dismissal appears to have been, his disrespect in not answering the letters of the committee; and that is not mentioned in the sixth plea. It is admitted that, if several statements are made, to establish one proposition, and that proposition is established by the proof of some only of such statements, the failure, as to the others, will not signify; but that is not the case here: only two of the allegations made against the plaintiff were proved. In *Spilsbury* v. *Micklethwaite*, if the plea had alleged that the plaintiff had committed a felony, and also a breach of the peace, and only the latter had been proved, it would not have been sufficient; and that, in effect, is the present case. They relied upon *Timothy* v. *Simpson*; *Cohen* v. *Huskisson* (*l*); *Bush* v. *Parker* (*m*); *Phillips* v. *Howgate* (*n*); *Stammers* v. *Yearsley* (*o*); *Reece* v. *Taylor* (*p*). As to the second count, the rule is, that if there has been a specific contract for goods or services, at a price certain, and such contract has been adopted, the value, according to the terms of the contract, is recoverable. If fraud or illegality is intended to be set up, it must be pleaded, *Martin* v. *Smith* (*q*).

TINDAL, C. J.—It will be the most convenient course in this case, to treat the two counts in the declaration as two separate actions, and to consider the pleas that apply to those counts accordingly. The *first* count states, that the plaintiff had entered the service of the defendants

(*h*) See also *Atkinson* v. *Warne*, 6 C. & P. 687; 1 C., M., & R. 827; 5 Tyr. 491; 3 D. P. C. 483.
(*i*) 3 Tyr. 907; 1 C. & M. 832.
(*j*) 2 B. & Adol. 456.
(*k*) 2 C. & M. 214; 4 Tyr. 43.
(*l*) *Ut supra*.
(*m*) 1 Bing. N. C. 72; 4 Mo. & Sc. 588.
(*n*) 5 B. & A. 220.
(*o*) 10 Bing. 35; 3 Mo. & Sc. 410.
(*p*) 1 Har. & Wol. 15; 4 N. & M. 469.
(*q*) *Ante*, 194; 4 Bing. N. C. 436.

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as accountant, at the yearly salary of 400*l.*, each year terminating on the 1st of *September;* and that the defendants promised to continue him in such employment; and the plaintiff then seeks to recover damages for the breach of this promise on the part of the defendants, they having dismissed him during a current year, to wit, on the 3d of *January*, 1837. To this count, the defendants have pleaded several pleas; but the *third* and the *sixth* are the only ones that are material on this occasion. The *third* plea is, that the defendants were induced to make the promise alleged in the first count through "the fraud, covin, and misrepresentation of the plaintiff, and others in collusion with him." Now, how is this plea borne out by the circumstances of the case? It is proved, that the company was originally established in *September*, 1834. In *April*, 1835, one of the defendants became a shareholder, and the other in the following *July*, and this is a joint suit against them. There does not appear to me, I own, to be any evidence to support this plea; the defendants came into the concern upon their own view of the circumstances connected with it, and there was no false statement made, *à priori*, to bring them in; the frauds, of which they have a right to complain, did not take place till several months after they had become partners. I think, therefore, that, upon the third plea, the verdict must be entered for the plaintiff. But the *sixth* plea stands upon a different footing: it alleges various acts of misconduct on the part of the plaintiff, and that, in consequence of them, he was dismissed from his situation. Upon this plea two objections are raised on the part of the plaintiff. The first is, that the whole of the allegations, as to the plaintiff's misconduct, are not proved; and the second, that, supposing the proof sufficient to satisfy the plea, still, the allegation, that the plaintiff was dismissed for the acts of misconduct stated in the plea, was not proved. As to the first objection, it is to be observed, that the plea contains three allegations of distinct acts of misconduct, on the part of the plaintiff: first, for not accounting for monies received by him; secondly, for making improper payments and false entries in the books; and, thirdly, for refusing to obey the defendants' reasonable commands; each of which would have been a sufficient ground for the plaintiff's dismissal. Now, one of these allegations was clearly proved: namely, that which relates to making the false entries concerning the sale of the salt; and this allegation does not in any way depend on the others. Then I am unable to distinguish this case from *Spilsbury* v. *Micklethwaite;* that was an action for assault and false imprisonment; the defendant pleaded a justification, stating that he was sheriff of the county, and was presiding at an election for members of parliament; that the plaintiff, being present, *assaulted him*, and made a great noise and disturbance, and obstructed the defendant in the execution of his duty. The jury found that the plaintiff *did not assault* the defendant, as alleged in the plea, but that all the other facts contained in the plea were proved; and the Court held that, as the plea consisted of two points, each of which would, if separately pleaded, have amounted to a good defence, one of those facts having been found by the jury, was sufficient to support the justification. I confess I am unable to distinguish that case in principle from the present. But, on the other hand, I think this case is clearly distinguishable from *Timothy* v. *Simpson;* that was also an action for assault and false imprisonment, and the defendant pleaded a justification that the plaintiff was unlawfully in his, the defendant's, dwelling-house, and then and there insulted,

abused and ill-treated the defendant and his servants, and disturbed them in the peaceable possession thereof; whereupon the defendant requested him to depart, but he refused to do so, whereupon the defendant gave him in charge to a policeman: it was proved that the plaintiff came into the defendant's shop during his absence, and that, in consequence of a dispute between him and the shopman, a scuffle ensued between them, and an affray took place; the defendant came in while this was going on, and desired the plaintiff to leave the premises, and, upon his refusing to do so, gave him in charge as alleged; and the Court held that, as *the fact of an assault upon the defendant was not proved*, the plea was not substantially established (*r*); as that was the only breach of the peace, which in the plea appeared by necessary implication to have been committed in the defendant's presence: for that was certainly a main and substantive part of the plea; and the whole was to be taken together as one ground of defence, and therefore, as the plea was bad in part, it was bad as to the whole. And, moreover, in giving judgment in that case, *Parke*, B., expressly recognizes the principle laid down in *Spilsbury* v. *Micklethwaite*, although that case does not appear to have been before the notice of the Court, for his Lordship says, "The replication puts in issue all the allegations constituting the ground of the arrest, and of these it is *not* necessary to prove *all*. It is enough to establish so many of them as would justify the arrest (*s*)." I think, therefore, that enough was proved to support the plea. The next objection is, as to the cause of the plaintiff's dismissal, that the proof was inconsistent with the allegation in the plea; inasmuch as the plea alleged various grave acts of misconduct as the causes of dismissal, while the evidence appeared to be, that he was dismissed for disrespect in not answering the letters from the Committee. Now, I am not prepared to say, but that if the plaintiff was discharged upon a good ground in point of fact, the defendants might not set up the real ground of the discharge in their pleadings, although, at the time of the discharge, they may have assigned a different cause; the cases of *Crowther* v. *Ramsbottom* (*t*), and *Grenville* v. *The College of Physicians* (*u*), there cited, would appear to sanction such a proposition; but in the present case the jury were, I think, justified in considering the real ground of the plaintiff's discharge, and what was passing in the minds of the committee at the time that step was resolved upon. It was proved, that enquiries and investigations were made into all the circumstances connected with the fraudulent report made in *December*, 1835, with which the plaintiff was so much mixed up; then, as to the letters written by the desire of the committee to the plaintiff, it is possible they may have been

(*r*) It is remarkable, that there was no allegation in the plea of an *assault* upon the defendant; the allegation was, that the plaintiff "*insulted, abused, and ill-treated the defendant* and his servants:" there was no evidence, however, to satisfy *this* allegation, as far as regarded the defendant himself, and this is probably what is meant by the Court.

(*s*) 1 C. M. & R. 764.

(*t*) 7 T. R. 654. In trespass, for breaking and entering the plaintiff's close, and taking his goods, the defendant may justify under a sufficient legal process, if he had it, in fact, at the time, although he declared then that he entered for another cause.

(*u*) 12 Mod. 386. *Trespass*, for assault, and wounding, and false imprisonment. *Plea*, as to the wounding, not guilty; and as to the residue, a justification under the authority of the censors of the college for mal-practice by the plaintiff, as a physician. *Replication de injuriâ, absque hoc* that the defendants made the assault *by the authority set forth in the plea*, held ill.

framed in a friendly spirit towards him: they tell him he must give up his claim before they can enter into the question of remuneration; then, as at first he takes no notice of their letters, and ultimately refuses to abandon his claim, at last comes his dismissal: now, it appears to me impossible to say that the real ground for such dismissal may not have been his previous misconduct; at any rate, the jury have drawn that conclusion, and I think they were fully justified in so doing. The verdict, therefore, for the defendant upon this issue, I think must stand. The second count is of a distinct nature from the former; it is rather singular that this count is not framed upon a breach of contract, but merely upon an *indebitatus assumpsit* for work and labour; the only pleas that it is necessary to consider, are the general issue, and the plea of payment. It has been argued, that the verdict for the defendant upon these pleas cannot stand, as the jury had taken the fraud into their consideration, which, as it was not pleaded, they were not entitled to do. But look at the situation of the parties upon these pleadings. The plaintiff sues for work and labour generally, not upon any special contract; and, at the trial, he puts a contract in evidence: how could the defendant know that he would set up that, so as to meet it by any special plea? He had a right, according to the cases, to shew that the plaintiff's labour was, in fact, valueless, and in this respect, the present case is not distinguishable from *Chapel* v. *Hicks*. Here, the plaintiff has been shewn to have grossly misconducted himself, and the jury were quite right to consider the value of the plaintiff's services from the time the defendants became partners in the concern; as they had nothing to do with the plaintiff's bygone services before that period: the jury, in estimating such value, take into their consideration the plaintiff's misconduct, his breach of duty to his employers, and that the services really performed were very small; and they come, and rightly, as I think, to the conclusion, that he has been amply paid by the 180*l.* which it was proved he had received. The result will be that, in my opinion, the rule ought to be made absolute for the verdict to be entered for the plaintiff on the issue raised by the third plea, and be discharged upon the other points.

PARK, J.—After the luminous statement made by the Lord Chief Justice, I am reluctant to trespass upon the time of the Court, and I shall, therefore, confine myself to a very few observations; and the more especially, as I entirely concur in all that has been said by his Lordship. Upon the third plea, the verdict must be entered for the plaintiff, for that plea goes to the inception of the contract, and there is nothing to shew that there was any fraud, either in the original concoction of the company, or in the circumstances under which the defendants were induced to join the concern. But, upon the sixth plea, the verdict must stand for the defendants; unless we are to overturn *Spilsbury* v. *Micklethwaite*, from which it is impossible to distinguish the present case. I take the rule to be this: *if a defence is founded on several propositions, a failure in one of them is a failure in all: but if in one plea there are suggestions of various independent facts, each of which would maintain the defence, a proof of any one of them is sufficient to support the plea.* *Taylor* v. *Cole* (*v*), is another authority in favour of the defendants upon this point: that was an action of trespass for breaking and entering the

(*v*) 3 T. R. 292; S. C. aff. in error, 1 H. Bl. 555.

plaintiff's house, and expelling him therefrom; and it was held, that a justification as to the breaking and entering, omitting the expulsion, was sufficient, as the breaking and entering were the *gist* of the action, and the expulsion was merely aggravation. The question here is, whether there are not three or four positive allegations of misconduct on the part of the plaintiff, each of which, if it stood alone, would be sufficient to justify his dismissal; and of that I think there can be no doubt. It has been pressed upon us in argument, that the misconduct mentioned in the plea is there stated as the reason for the plaintiff's discharge, but that, in fact, he was dismissed for another cause; it was, however, a matter for the jury, to say whether the dismissal was for the facts alleged in the plea, or for those contained in the letters written by order of the committee; those letters might, as has been suggested by my Lord, have been dictated by kindly feelings towards the plaintiff, from a wish not to fix a stigma upon him, but which, from the course he has now pursued, he has effectually fixed upon himself. Then, as to the count for work and labour, the case of *Chapel* v. *Hickes* is precisely in point. The principle is clear, that *where there is a special contract, and the plaintiff sues upon a common count, and gives the contract in evidence, it is competent to the defendant to shew the worthlessness of that which has been done under the contract.* In the present case, it is tolerably clear that the plaintiff has not done what, by the special contract, he was required to do. Upon the whole, I am satisfied that substantial justice has been done in this case.

VAUGHAN, J.—I am of the same opinion. It is agreed to consider the two counts as though they were two separate actions. The first is for a breach of a contract by the dismissal of the plaintiff from the defendant's service during a current year: the only pleas which it is material to consider, are the third and the sixth; as to the third, I thoroughly concur in all that has been said; there is no proof of any fraud to induce the defendants to become shareholders in the concern; upon this count, therefore, the plaintiff is entitled to a verdict. With regard to the sixth plea, I consider that the allegations are clearly divisible; and if one of them be proved, which would alone constitute a sufficient defence, it will support the plea, and the others may be rejected as surplusage. Before the new rules, all the facts alleged might have been given in evidence under the general issue; and if each of them were now required to be pleaded separately, what a record it would make! The company were certainly justified in dismissing the plaintiff for his misconduct in making the false entries, which was eminently calculated to injure them. It is said, however, that he was really dismissed for disrespect, and therefore, that the plea is not supported; but I think it was competent to the defendants to allege in their plea the real cause of his dismissal, even though it should be different from the one alleged at the time; and if they prove so much of that allegation as would justify the dismissal, that, upon the authority of the cases cited, would be sufficient. As to the *indebitatus* count, if the plaintiff choose to proceed upon a *quantum meruit*, and then set up a contract by which he shews that *primâ facie* he is entitled to 400*l.* a year, it is open to the defendants to shew that the plaintiff's services were worthless, or only worth a certain sum; and of that fact the jury were the competent judges, and they have found that what he has already received was quite sufficient.

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COLTMAN, J.—I agree that, upon the third plea, the plaintiff is entitled to the verdict, and also that the defendant is entitled to it on the sixth plea, agreeably to the principle, that if the substance of a plea is proved it is sufficient, which means, if enough is proved to support the plea. The question as to the cause of the plaintiff's dismissal, was entirely for the jury; the question upon the second count is entirely different; the plaintiff was to have 400*l.* a year, of course upon the condition of the proper performance of his services; he sues, however, upon an *indebitatus* count, and it is contended that, under the general issue, it is not competent to the defendants to set up the defence they have done; but I think there is a fallacy in this argument, for the defendants do not put forward the plaintiff's fraud as an answer to the action, but only as to the amount of damages. The defendants could have no notice, under that count, that the plaintiff intended to set up the special contract, and it was surely open to the plaintiff to say that the plaintiff's services were worth no more than 180*l.*, which he had already received.

Rule absolute, to enter the verdict for the plaintiff upon the third plea; discharged upon the other points.

June 1.

STEVENS and another *v.* UNDERWOOD.

To a declaration on a bill of exchange against the acceptor, the defendant pleaded that it was accepted under duress and averred that he never had any value for the acceptance:—*Held*, such plea was *double*.

DECLARATION by the drawers against the acceptor of a bill of exchange: with a count upon an account stated.

Pleas: as to the *first* count, that the defendant, before and at the time of making the said acceptance, was unlawfully imprisoned by the plaintiffs and others, in collusion with them, and then and there detained in prison until, by the force and duress of the said imprisonment of him, the said defendant, he made the said acceptance. *Averment*, that the defendant never had value for the said acceptance, or for paying the said bill of exchange, or any part thereof respectively. *Verification.*

As to the *second* count, that before the stating of the account therein mentioned, to wit, on the 14th of *February*, 1832, the plaintiffs made their bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to their order the sum of 46*l.* 6*s.*, six months after the date thereof. *Averment*, that the defendant accepted the said bill of exchange, and that before, and at the time of making the said acceptance, he was unlawfully imprisoned by the plaintiffs, and others in collusion with them, and then and there detained in prison until, by force and duress of the said imprisonment, he made the said acceptance. Further *averment*, that the defendant had never had any value for the said acceptance, or for paying the said bill, or for any part thereof respectively. Further *averment*, that the said account in the *second* count mentioned, arose wholly upon the said bill of exchange and acceptance thereof, and not otherwise. *Verification.*

Demurrer; to the *first* plea, as being double and multifarious, to wit, that it contains two distinct matters of defence to the said *first* count, to wit, that the acceptance of the said bill in the said *first* count mentioned, was unlawfully obtained by the plaintiffs from the defendant by duress of imprisonment, and that there never was any value for the said acceptance; and to the *second* plea, upon the same grounds. *Joinder.*

Hoggins, for the demurrer, was stopped by the Court.

Mansel, in support of the pleas.—The pleas do not contain two entire defences. It was necessary to set out the circumstances which shewed want of value, as a plea, merely stating that the defendant had received no value, would have been bad; *Easton* v. *Pratchett* (*a*); *Noel* v. *Rich* (*b*); *Reynolds* v. *Ivemey* (*c*); *Lacey* v. *Forrester* (*d*); *Stoughton* v. *Earl of Kilmorey* (*e*); *Mills* v. *Oddy* (*f*). In *Com. Dig.* "*Pleader*" (E. 2), it is said, a plea is not double "if the defendant plead several matters, and concludes *et sic non est factum*" (*g*); should the Court, however, think the pleas bad, he would crave leave to amend.

Hoggins, in reply.—*Duress* alone would have been a sufficient defence to the action, *Com. Dig.* "*Pleader*" (2 *W.* 19); the additional allegation of want of value, though it may be informally pleaded, renders the pleas double.

TINDAL, C. J.—I am of opinion that these pleas are bad for duplicity; they set up two several defences; namely, that the bill upon which the action is brought, was given under duress of imprisonment, and also that the defendant never had value for his acceptance. It is argued, on the part of the defendant, that the second defence, as it stands upon the record, is not sufficient, as not setting forth the circumstances to shew want of consideration; but that only amounts to saying, that it is a defence badly pleaded, and that will not avail the defendant; for a second defence may be inartificially pleaded, and nevertheless the plea will be bad for duplicity. In *Com. Dig.* "*Pleader*" (E. 2), it is said, "a double plea is bad, though one matter or the other be not well pleaded; as in trespass, if the defendant pleads *molliter manus imposuit*, and a release, it is double, though the release is not well pleaded (*h*). So, though but one of the several matters be material" (*i*). The want of value is put forward as a ground of defence, and it does not lie with the defendant to say it has been set forth in an insufficient manner. However, as he has craved leave to amend, it may be granted on payment of costs.

Leave to amend granted, on payment of costs.

(*a*) 1 Gale, 30; S. C. 1 C., M. & R. 798; 3 D. P. C. 472; S. C. aff. on error, 1 Gale, 250; 2 C., M. & R. 542; 4 D. P. C. 549.
(*b*) 1 Gale, 225; S. C. 2 C., M. & R. 360; 4 D. P. C. 228.
(*c*) 3 D. P. C. 453.
(*d*) 1 Gale, 139; S. C. 2 C., M. & R. 59; 5 Tyr. 569; 3 D. P. C. 668.
(*e*) 1 Gale, 91; S. C. 2 C., M. & R. 72.
(*f*) 1 Gale, 92; 2 C., M. & R. 103, 6 C. & P. 728.
(*g*) Citing Kit. 223, b, 224, a, (ed. 1623); S. P. 449, ed. 1675.
(*h*) R. 1 Sid. 176.
(*i*) *Per* Dod. Poph. 186.

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May 26.

NORMAN *v.* WINTER.

The affidavit for a *distringas* to compel an appearance, should state an application at the defendant's last place of residence.

WILDE, Serjt., moved for a *distringas* to compel an appearance, upon affidavits stating that the defendant resided in *Russell-square* in the year 1833; that the plaintiff could not ascertain her present place of abode; that frequent applications had been made to the defendant's brothers to learn such abode, but without success; and that the plaintiff believed she was purposely keeping out of the way.

Per Curiam.—The presumption upon these facts would rather be, that the defendant was either abroad or dead. The plaintiff had better amend his affidavit, stating that an application has been made at the defendant's last place of residence; this will be more consistent with the practice of the Court (*a*).

Subsequently (on the 2d of *June*), *Wilde* obtained a rule, absolute in the first instance, for leave to vacate the above writ of *distringas*, and to issue one to proceed to outlawry.

(*a*) See 2 *W.* 4, c. 39, s. 3, and *Pitt* v. *Eldred*, 1 C. & J. 147, and Tyr. 128; *Bowser* v. *Austen*, 2 C. & J. 45.

June 5.

TWYSDEN, Bart., *v.* STULTZ and others.

Where a plaintiff had given a peremptory undertaking to try at the Sittings after *Easter Term*, but during that Term, under counsel's advice, made it a special jury cause, whereby it became a *remanet*, the Court, in *Trinity Term*, discharged a rule for judgment as in case of a nonsuit, upon the plaintiff's giving a peremptory undertaking to try at the Sittings after that Term.

THE plaintiff, in last *Hilary Term*, had given a peremptory undertaking to try at the Sittings after *Easter Term*; in *Easter Term* he obtained a rule for a special jury, and struck and reduced the same, in consequence of which, the cause did not come on for trial at the Sittings after the Term:

Hoggins thereupon, on a former day in this Term, obtained a rule *nisi* for judgment as in case of a nonsuit.

Fitzjames shewed cause; his affidavits stated that it had been made a special jury cause under counsel's advice, and without any intention of vexatious delay.

THE COURT, under the circumstances, discharged the rule upon plaintiff's giving a peremptory undertaking to try at the Sittings after this Term (*a*).

(*a*) See *Rucker* v. *Ansley*, 2 Chit. R. 243; *Master* v. *Milner*, 1 Bing. 70, 7 Moo. 367; *Cope* v. *Holt*, 1 D. & R. 180; *Pitt* v. *Evans*, 2 D. P. C. 226; *Charrinton* v. *Meatheringham*, 4 D. P. C. 479; *De Rutzen* v. *Richards*, 1 Har. & Wol. 210.

Doe, dem. Barth *v.* Roe.

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June 1.

In country ejectments, the plaintiff is entitled to judgment after that Term in which the tenant is required to appear.

ARCHBOLD, in this Term, obtained a rule *nisi* for judgment against the casual ejector in this case, which was a country ejectment, upon an affidavit of service before the first day of last Term, in which Term the tenant in possession had been required to appear.

Petersdorff shewed cause, and referred to *R. E.*, 2 *G.* 4 (*a*).

Archbold.—That rule applies only to the *appearance* of the tenant. In country causes, judgment may be signed against the casual ejector in the Term following that in which the appearance is required, but not in the third Term; *Doe* v. *Roe* (*b*); *Doe* v. *Roe* (*c*); *Doe*, dem. *Greaves* v. *Roe* (*d*); *Right*, dem. *Jeffery* v. *Wrong* (*e*); *Doe*, dem. *Thomson* v. *Roe* (*f*); *Doe*, d. *Reeve* v. *Roe* (*g*); *Doe*, dem. *Wilson* v. *Roe* (*h*).

The Court made the rule absolute.

(*a*) By which it is ordered, "that in all country ejectments, which shall be served before the *essoign* day of any *Michaelmas* or *Easter Term*, the time for the appearance of the tenant in possession shall be within four days after the end of such *Michaelmas* or *Easter Term*, and shall not be postponed till the fourth day after the end of *Hilary* or *Trinity Term* next respectively following." As to the *essoign* day, see 11 G. 4, and 1 W. 4, c. 70, s. 6; 1 W. 4, c. 3, s. 1; *Price* v. *Hughes*, 1 D. P. C. 448; see also *R. T.*, 1 W. 4, s. 7.

(*b*) 1 D. P. C. 495.
(*c*) 2 D. P. C. 196; 2 Tyr. 724.
(*d*) 4 D. P. C. 88.
(*e*) 2 D. P. C. 348.
(*f*) 3 D. P. C. 575.
(*g*) 1 Gale, 15.
(*h*) 4 D. P. C. 124. See also *Doe*, dem. *Wiggs* v. *Roe*, 1 Will. Wol. & Dav. 391; 5 D. P. C. 662; *Doe*, d. *Thring* v. *Roe*, 3 Hodg. 13; *Doe*, d. *Croom* v. *Roe*, 1 Will. Wol. & Hodg. 85.

Haward *v.* Smith.

June 6.

To a declaration on a bill of exchange, a plea that the bill was not *duly* stamped, *held* ill.

ASSUMPSIT, by the drawer against the acceptor of a bill of exchange.

Plea, that the bill was not, at the time when it was made, or at any time since, nor is the same *duly stamped* or marked with *any proper stamp* or mark denoting that the lawful, requisite and proper rate or duty chargeable or charged thereon, had been or was duly stamped, marked, or impressed thereon, contrary to the form of the Statute, &c. *Verification.*

Special demurrer, because *no issue of fact* can be raised upon the plea, nor is any matter of fact at all stated or denied in it; and because the plea intends to raise the defence that the bill is not properly stamped, and yet does not describe the stamp, nor shew what stamp was or is stamped upon the said bill, and therefore, the plaintiff is precluded, either from confessing and avoiding the plea, and also from traversing the plea, and also from demurring to it. Nor does the plea shew in what respect the stamp of the said bill is improper or insufficient, nor what are the facts or circumstances, by reason

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whereof the stamp has been or is unduly stamped upon the said bill; and the said plea is also equivocal and uncertain, because it may either mean that the said bill is not stamped at all, or that it is stamped insufficiently. *Joinder.*

Peacock, for the demurrer.—The plea raised an issue of law, which the jury could not decide; *Hume* v. *Liversidge* (*a*). At any rate, it should have stated how the stamp was insufficient, *Ashby* v. *Harris* (*b*); *Mure* v. *Kaye* (*c*).

Bere, in support of the plea, contended it was a mixed question of law and fact, which might properly be left to the jury.

Peacock, in reply.—The question raised is, whether the bill is *duly* stamped, and that is purely a question of law.—[*Tindal*, C. J.—Would not an issue whether a will were *duly* executed, be good?]—It is submitted, that a plea in those words would be bad; it ought to state that it was not attested by two witnesses. Consistently with the present plea, the bill might have a higher stamp than was requisite; for in that case the stamp would not be proper, although it would be *sufficient* (*d*).

TINDAL, C. J.—I think the plea is insufficient, as it leaves the plaintiff in doubt as to the nature of the defence; it is not clear whether the defendant means that the bill has no stamp at all, or that it has one of too low or of too high a denomination.

The other judges agreeing,

Judgment for the plaintiff.

(*a*) 1 C. & M. 332; 1 D. P. C. 660.
(*b*) 1 Mur. & Hurls. 173; 2 M. & W. 673; 5 D. P. C. 742.
(*c*) 4 Taunt. 34.
(*d*) See 55 G. 3, c. 184, s. 10.

June 8.

HARTLEY *v.* BURKETT.

To a declaration, alleging that it was the defendant's duty, as tenant of a farm, to manage such farm in a husbandlike manner, *and* according to the custom of the country, and stating, that he had, in a bad and untenantable manner, *and* contrary to the custom of the country, taken hay off the land without bringing back manure.—A plea, traversing the custom, is good.

DECLARATION in *Case*, that the defendant had become and was tenant to the plaintiff of a certain close of pasture land, with the appurtenances, &c, and by reason thereof, it became and was the duty of the defendant, during the continuance of the said tenancy, to manage, use, and cultivate the said close *in a good and husbandlike manner, and according to the custom of the country* where the said close was so situate as aforesaid; that the defendant continued such tenant for a long time, &c.; but that the defendant, disregarding his said duty in that behalf, whilst he was such tenant, as aforesaid, to wit, on the 1st day of *January*, 1831, and on divers other days and times afterwards, and in the five next succeeding years, wrongfully and injuriously, and *in a bad and untenantable manner, and contrary to the custom of the country* where the said close so was, as aforesaid, in that behalf, took

and carried away, off and from the said close, divers, to wit, 500 cart-loads of hay, which had arisen, grown, and been made on the said close during the said tenancy, and spent and consumed the same elsewhere than on the said close or any part thereof, without, at any time, bringing back, and spending, and spreading on the said close one load of dung, manure, or compost, for or upon each and every acre of the said close, during each and every year of the said tenancy, and without bringing back, spending, or spreading on the said close any dung, compost, or manure whatever; by means of which said several promises, the hedges and fences of the said close have become and are much injured and damaged, insomuch that divers sheep and cattle, lawfully being in and near to the adjoining closes and premises, have, since the defendant ceased being such tenant, as aforesaid, escaped and erred into the said close, and eat up and depastured the grass and herbage thereof, and otherwise much injured and damaged the same, and the said hedges and fences; and also, by means of the premises, the said close hath become and is impoverished and deteriorated in value, and the plaintiff hath been and is, by means of the premises, otherwise greatly injured and damnified, &c.

Second plea.—As to so much of the said declaration as relates to and charges the defendant with carrying away, off and from the close, in the declaration mentioned, divers large quantities of hay, which had arisen and been made on the said close during the said tenancy, and spending and consuming the same elsewhere than on the said close or any part thereof, without, at any time, bringing back, and spending, and spreading on the said close one load of dung or compost manure, for or upon each and every acre of the said close, during each and every year of the said tenancy by the defendant above supposed to have been done, and that the doing so was *contrary to the custom of the country* where the said close so was, as is by the defendant above supposed to have been done, the defendant says that, at the said times when &c., in the said part of the declaration in that behalf mentioned, *there was not*, nor is there *any such custom of the country* where the said close was, as aforesaid, as the plaintiff has in the said part of his declaration in that behalf alleged. And of this, the defendant puts himself upon the country, &c.

Demurrer. That the defendant, in and by his said plea, hath divided an indivisible allegation in the said declaration; that allegation, in substance, being, that the defendant was guilty of a breach of duty in not managing, using, and cultivating the said close *in a good and husbandlike manner and according to the custom of the country;* and the defendant hath alleged in that plea matters of defence only to part of that indivisible allegation, (namely) that the defendant was not guilty of a breach of *the custom of the country.* And also, for that the said plea tenders issue of an immaterial fact, when it stands by itself, namely, the custom of the country alleged in the declaration; and for that the meaning of the defendant's duty, as alleged in the declaration, is, that the defendant was to manage, use, and cultivate the said close according to the most prevalent custom of good husbandry in the neighbourhood where the said close was, and the allegation is not divisible, nor is the breach founded thereon. And also, for that the plaintiff has not alleged that there was any such custom as that traversed in and by the said plea; and for that the defendant hath not, in and by his said plea, confessed or avoided the matters to which the said plea is pleaded; and also, for that the said

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second plea amounts to the plea of Not Guilty to part of the grievances in the declaration alleged, and is argumentative, &c.

Wightman, in support of the *demurrer*.—The declaration alleges, that it was the duty of the defendant to manage the farm in a husbandlike manner, *and* according to the custom of the country; the breach of duty alleged is, that the defendant, in a bad and untenantable manner, *and* contrary to the custom of the country, carried hay off the farm without bringing back manure: the plea merely denies that there was such a custom, but says nothing as to the alleged breach of duty to manage the farm in a husbandlike manner.—[*Tindal*, C. J.—The word "and," seems to have no business in that part of the declaration. The plaintiff alleges a specific instance of breach of duty; the defendant denies that there was any such duty by the custom of the country. Suppose he had denied that the act complained of was contrary to a husbandlike management of the farm.]—The allegation in the declaration is indivisible, and if the parties had gone to trial, the plaintiff must have proved both the course of good husbandry and the custom, *Angerstein* v. *Handson* (*a*).—[*Tindal*, C. J.—The plea is only an answer to part of the breach. Suppose the defendant had said, as to so much as relates to good husbandry, Not Guilty, and as to so much as relates to the custom, had traversed such custom.]—That might have been sufficient, but the present plea professes to answer the whole breach. The plaintiff says, there is a duty imposed upon the defendant by two rules; the defendant says, one of those rules does not exist; but that is no answer to the alleged breach of such duty.

Martin, in support of the plea.—The declaration alleges two distinct breaches of duty, and the plea is an answer to one of them. If the plea is not an answer to the whole breach, the plaintiff might have taken judgment by default for the part not answered. The plea of *Not Guilty* would not have put the custom in issue, but merely the fact of the defendant's not having done the act alleged; *Wright* v. *Lainson* (*b*).

Wightman was heard in reply.

TINDAL, C. J., said, there did not appear to be any real and substantial objection to the plea; when

Wightman craved leave to amend, by striking out the *demurrer*, and joining issue in fact.

Granted.

(*a*) 1 Gale, 8; 1 C., M. & R. 789; 5 Tyr. 583 (*b*) 2 M. & W. 739.

MASON *v.* WHITEHURST.

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June 9.

Where, by the Master's *allocatur*, the plaintiff is ordered to pay the costs of the day "to the plaintiff," without adding "or his attorney," a demand by the latter is, nevertheless, sufficient, whereon to ground an attachment.

IN this case an attachment had been granted against the plaintiff for not paying the costs of the day (incurred in not going to trial), pursuant to the Master's *allocatur*.

R. V. Richards, in *Easter Term*, obtained a rule *nisi* to set aside the attachment and proceedings thereon, and that the defendant should repay the plaintiff the costs of the day, which the latter had paid: it appeared, from his affidavits, that the order was drawn up to pay the costs of the day "*to the defendant*," (without adding "or to his attorney;") and that the demand had been made *by the attorney* upon the record, who had, however, no power of attorney to make such demand; and, upon non-payment of the costs, the attachment had issued, subsequently to which, the costs had been paid: he cited *Doe*, dem. *Chippen* v. *Roe* (*a*).

Whately, in the same Term, shewed cause.—The demand was well made by the attorney on the record, who was entitled to the costs in the first instance, and had a lien upon them; he referred to 2 *Arch. Prac.*, 1051. 4th ed., where it is said that if "a demand is made of the costs *by the person to whom they are payable, according to the terms of the rule*, or *by some person deputed by him by letter of attorney*," upon non-payment, an attachment will issue.

Richards, in reply, was stopped by the Court, who made the *rule absolute*.

TINDAL, C. J., however, now said that, upon consideration, the Court were of opinion that, under the circumstances of the case, the demand was sufficient, and that the attachment ought to stand; and the above rule was, consequently discharged (*b*).

(*a*) 1 Scott, 588, n.

(*b*) When the Court gave judgment on the former occasion, their attention was not directed to the following passage in the same page of Mr. *Archbold's* work, then referred to: "Where the plaintiff's attorney demanded the costs, without a letter of attorney authorizing him to do so, it was deemed sufficient; for the attorney was, in fact, entitled to the costs when received; (*Per Holroyd*, J., M. S. T. 1820.)" In *Cox* v *Salmon* (2 Gale, 226; 2 M. & W. 127), it was held, that a demand of *the costs in the cause* by the plaintiff's attorney, is sufficient to obtain an attachment, although the Master's *allocatur* does not direct them to be paid to him; and upon the authority of that case, it was decided in the *Exchequer*, in this Term (*Trinity*), that where the order was to pay *the costs of the day* (as in the principal case), "to the plaintiff," a demand by his attorney was sufficient whereon to ground an attachment; *Inman* v. *Hill*, (Exch T. 1838; *ex relatione.*)

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STAFFORD *v.* NICHOLS.

June 11.

The time for pleading having expired, the clerk of the plaintiff's attorney was sent to sign judgment; after his departure, the defendant's attorney tendered a plea at the office of the plaintiff's attorney, who said he would accept it if judgment were not signed; defendant's attorney hastened to the judgment office, and arrived there just as judgment was signed:—*Held*, the judgment was regular.

THE time for pleading in this action expired on the 18th of *May*. On the morning of the 19th, the clerk of the plaintiff's attorney was sent to the office to sign judgment: immediately after his departure, the defendant's attorney called at the office of the plaintiff's attorney, and tendered a plea: the latter informed him of the state of affairs, and said he would take the plea if the judgment was not yet signed; whereupon the defendant's attorney hastened after the clerk, and arrived at the judgment office just as judgment had been signed.

Wilde, Serjt., obtained a rule *nisi* to set aside the judgment for irregularity, inasmuch as the plea was, in fact, delivered at the office of the plaintiff's attorney before the judgment was signed; he also produced an affidavit of merits.

Talfourd, Serjt., shewed cause, and contended that the judgment was regular, as it was signed in ignorance of any plea having been delivered.

Wilde was heard in support of the rule.

TINDAL, C. J.—The defendant was in fault in not having delivered his plea in time; if, however, he had delivered it before the judgment was signed, such judgment would have been irregular; but no authority has been cited to shew that if judgment is *bonâ fide* signed without the knowledge of any plea having been delivered, such judgment is irregular. As the defendant, however, has produced an affidavit of merits, the judgment may be set aside upon payment of costs, with all the usual terms.

PARK, J.—I am of the same opinion. Suppose an attorney lives at *Brentford*, and sends off his clerk to sign judgment, and the defendant's attorney, after he was gone, delivers a plea at the office of the plaintiff's attorney; would that have the effect of rendering the judgment, signed *bonâ fide*, irregular?

VAUGHAN, J.—I am of the same opinion. The plea here was not regularly delivered before judgment was signed.

COLTMAN, J., concurred.

Rule absolute, upon payment of costs.

June 12.

CURLING *v.* SEDGER.

An attorney's bill, for business done at the *Central Criminal Court*, is within the 2 G. 2, c. 23, s. 23; and therefore, the superior Courts have authority to order such bill to be taxed.

SOME incendiary fires having taken place in the parish of *St. Mary, Rotherhithe*, the plaintiff, an attorney, had been employed by the defendant, a churchwarden of that parish, to take means to discover and prosecute the

offenders. The plaintiff subsequently sent in his bill for the business done by him in that behalf, which had been wholly transacted at the *Central Criminal Court*. The bill not having been paid, the plaintiff commenced an action to recover the amount; whereupon the defendant obtained a judge's order to refer the bill to taxation.

Stephen, Serjt., in last *Easter Term*, obtained a rule *nisi* to discharge this order, on the ground that the bill was not taxable under 2 *G.* 2, c. 23 (*a*); as there was no taxing officer in the *Central Criminal Court*, and the practice there was not limited to attorneys.

Wilde, Serjt., and *Smithies*, in the same Term, shewed cause.—The Statute 2 *G.* 2, c. 23, has always received a liberal construction; *Tindal*, C. J., said, in *Smith* v. *Taylor* (*b*), "When we consider this is a remedial Act, it is far better to bring a case within its operation, than to leave it altogether unprovided for" (*c*). In conformity with this principle, it has been held that a bill for business done at the *Quarter Sessions* is taxable, *Ex parte Williams* (*d*); *Clarke* v. *Donovan* (*e*); *Sylvester* v. *Webster* (*f*); or in the *County Court; Wardle* v. *Nicholson* (*g*). The *Central Criminal Court* is established by 4 & 5 *W.* 4, c. 36; by the first section of which, the Lord Chancellor and the judges of the superior Courts at *Westminster*, are constituted the judges of the Court: by sections 2 and 4, it is made a Court of *oyer* and *terminer;* by section 12, two of the judges of the Court are "to order and direct the costs and expences of prosecutors and witnesses to be paid by the treasurer of the county;" and by section 16, indictments found at the sessions of the peace, may be removed by *certiorari* before that Court.—[*Tindal*, C. J.—It certainly would be very inconvenient at the trial, if such a bill could not be referred; it would be a long and tedious investigation for a jury.—*Stephen*, Serjt.—The present is a mere question of law, and the Court will not look to the mere convenience of the case.]—In the construction of a remedial Act, the Court *will* look to the convenience of the case; the object of the Act being to protect suitors. It has been said, on the other side, that there is no taxing officer in the *Central*

(*a*) (Made perpetual by 30 G. 2, c. 19, s. 75.) Sec. 1 enacts, that "no person shall act as an attorney in His Majesty's Court of *King's Bench*, *Common Pleas*, or *Exchequer*, &c., or *in any other Court of record* wherein attorneys have been accustomably admitted and sworn, unless such person shall take the oath hereinafter directed, and shall also be admitted and enrolled, &c." Sec. 3 contains a similar enactment as to a solicitor practising in a *Court of equity*. Sec. 23 enacts, that "no attorney *of any of the Courts aforesaid* shall commence any action for the recovery of *any fees, charges or disbursements, at law* or in equity, until the expiration of one month after such attorney shall have delivered a bill of such fees, &c.; and, upon application of the party chargeable by such bill, *unto a judge of any of the said Courts in which the business contained in such bill shall have been transacted*, it shall be lawful for the said judge to refer the bill, although no action shall be depending in such Court touching the same, *to be taxed by the proper officer of such Court.*"

(*b*) 7 Bing. 259; 5 M. & P. 66; 1 D. P. C. 212.

(*c*) See also *Winter* v. *Payne*, 6 T. R. 646; and *Watt* v. *Collins*, 1 R. & M. 286.

(*d*) 4 T. R. 124, 496.

(*e*) 5 T. R. 694.

(*f*) 9 Bing. 388; 2 Mo. & S. 506; 1 D. P. C. 708.

(*g*) 4 B. & Ad. 469; S. C. 1 N. & M. 355: but see note (*a*), *Ib.* 357, which throws some doubt upon the propriety of the decision in this case.

Criminal Court, and that the practice there is not limited to attorneys; and these are put forward as the tests of the right to tax bills. Upon the first point, *Beck* v. *Wells* (*h*), will be relied on by the other side, where it was held, that the Statute of *G.* 2 did not apply to business done in the *Middlesex* Court of Requests, upon the ground, as *Bayley*, B., stated, that there is no taxing officer in that Court; although, in the previous case of *Jones* v. *Byewater* (*i*), (where the question was raised, whether a bill for business done in *lunacy* were taxable), the same learned baron intimated his opinion that the test was, whether the business were done in a judicial proceeding, and whether a person swearing falsely in such an investigation, could be indicted for perjury (*j*). But it is a fallacy to say there is no taxing officer in the *Central Criminal Court*; for wherever the Court has power to award costs there must be a taxing officer; but the *Court of Requests* has no power to give costs, for they are always fixed by the Statute that creates the Court.—[*Tindal*, C. J.—The clerk of the Crown taxes in the Criminal Court at the assizes.]—The *Central Criminal Court* is a Court of *oyer* and *terminer*, and is merely a subordinate branch of the Court of *Queen's Bench*, and is, therefore, a Court of law; the prosecutor's fees and expences, which the judges of the Court are authorized to allow, include charges for preparing the brief, and the fees to counsel; and the amount to be allowed in respect of these charges is always discretionary.—[*Stephen*, Serjt.—The costs are not taxed as between attorney and client.]—They are taxed as between the attorney and the county, which stands in the place of a client. An attorney, doing business in the *Central Criminal Court*, is entitled to certain professional fees; any other person could only recover upon a *quantum meruit*. The proper rule is, that where an attorney of one of the inferior Courts does business *at law* or equity, which might have been done by an unprofessional person, the case falls within the provisions of 2 *G.* 2, and the attorney's bill for such business is taxable; this is the result of Lord *Tenterden's* judgment in *Smith* v. *Wattleworth* (*k*), where it was decided, that the case of an agent appointed to practise in the Insolvent Debtors' Court, if he be an attorney of any of the superior Courts of record, (for by the then existing Insolvent Act, 1 *G.* 4, c. 119, the agents so appointed were not necessarily attorneys), was within the 2 *G.* 2, and this disposes of the second point relied upon by the other side (*l*).

(*h*) 1 C. & M. 75; 3 Tyr. 193.

(*i*) 2 C. & J. 371; 2 Tyr. 402; 1 D. P. C. 557.

(*j*) See note (*l*), *infra*.

(*k*) 6 D. & R. 510; 4 B. & C. 364; 1 C. & P. 615.

(*l*) It is observable that, in the last mentioned case, where the question was, whether an attorney was bound to deliver his bill, for business done in the Insolvent Court, a month before action, it was argued that the case did not come within the operation of the 2 G. 2, because there *was a taxing officer* in the Insolvent Court; Lord *Tenterden*, however, in giving judgment, thus disposed of that argument: "As to the appointment of an officer in the Insolvent Debtors' Court, to tax the bills of agents, that is a circumstance by no means conclusive upon this question; nor do I know that it is of any importance. Admitting, for the present, that there is a tax-master of that Court, who has authority to tax bills as between the attorney and his client, still, it does not appear to me, that such a taxation would take the case out of the provisions of this Act of Parliament, which are extremely beneficial to the subject, by enacting that all attorneys shall not recover their costs, at law or equity, without delivering their bills at least one month beforehand, whether they have or have not been taxed," (6 D. & R. 513, 4); and in this opinion *Bayley*, J. (who was then in the *King's Bench*), is reported to have concurred. (*Ib.*)

Stephen, Serjt., and *Channell*, in support of the rule.—The order here is, to refer to the Master of this Court, and not to the taxing officer (assuming that there be one,) of the Central Criminal Court; but, in point of fact, there is no regular taxing officer in that Court. The general rule is that an attorney's bill is not to be referred to the officers of a superior Court, unless at least *some part* of the business has been done in that Court.—[*Bosanquet*, J.—If an action were brought in the *Queen's Bench* for business done wholly in this Court, would not the *Queen's Bench* refer the bill to their own officer?]—The true ground turns upon the point above stated, *Ashton* v. *Molineux* (*m*); *Exparte King* (*n*); *Williams* v. *Odell* (*o*); *Ex parte Partridge* (*p*); and this is consistent with the language of the Statute. Upon this principle it was formerly held, that business done at the *Quarter Sessions* was not within the Statute, *Stephenson* v. *Taylor* (*q*); *Exparte Williams* (*r*); and when at last that case was admitted as an exception to the rule, it was solely upon the ground of an established practice (*s*). The present case must be decided entirely upon the construction of the Statute 2 *G.* 2; as it is impossible now to contend that the Courts have any *common law jurisdiction*, independently of that Statute, over the taxation of attorneys' bills, *Dagley* v. *Kentish* (*t*); *Howard* v. *Groom* (*u*); although a different doctrine formerly prevailed, *Rex* v. *Back* (*v*). The decisions as to the

(*m*) Barnes, 122. This case is often cited as an authority, to shew that business done at the Sessions was formerly considered *not* taxable (see 1 Tidd. Pr. 321, 6th ed.); but it does not appear from the report that the business there was done *at the Sessions*; it is stated to have been done "in *Doncaster Court, Yorkshire*;" and upon shewing cause against the rule for referring the bill to the prothonotary, "it appeared that all the *business* was done in *Doncaster* Court, and *the bill had been taxed by the proper officer there*." There is a Court of record at *Doncaster*, held under a charter granted by Henry 8, for the recovery of debts to any amount; and it is probably to this Court that the report alludes.

(*n*) 3 N. & M. 437.

(*o*) 4 Price, 279, and see *Ex parte Wheeler*, 3 Ves. & B. 21, S. P.

(*p*) 2 Mer. 500; 3 Swans. 398.

(*q*) 4 T. R. 124, n.; *Sel. Ni. Pri.* 163, n. 6th ed.

(*r*) 4 T. R. 124.

(*s*) *Ib.* 496.

(*t*) 2 B. & Ad. 411; 1 D. P. C. 330.

(*u*) 4 D. P. C. 21; S. C. not S. P. 1 Har. & Wol. 355. See also *Clutterbuck* v. *Coombes* (2 N. & M. 20); 5 B. & Ad. 400;) *Ex parte King* (*ut supra*;) *Doe*, dem. *Palmer* v. *Roe* (1 Har. & Wol 339; 4 D. P. C 95;) *Ex parte Bowles* (1 Hodg. 143; 1 N. C. 632; 1 Scott, 583;) *Weymouth* v. *Knipe* or *Knight* (2 Hodg. 280; 3 N. C. 387; 3 Sc. 764; 5 D. P. C. 495.)

(*v*) 9 Price, 349 See also *Anon.* (2 Chit. R. 155;) *Wilson* v. *Gutteridge* (4 D. & R. 736; 3 B. & C. 157;) *Watson* v. *Postan* (2 C. & J. 370; 2 Tyr. 406; 1 D. P. C. 556.) The question, whether the Courts have an authority at common law to refer attorneys' bills to be taxed, is involved in no small confusion; in the cases last cited, the Courts as unhesitatingly asserted such authority, as in those, just before referred to, they repudiated it. In none of these cases, however, does there appear to have been any reference to what the practice was before the passing of 2 G. 2, c. 23. Now, it is beyond doubt that, before that Statute, the Courts were in the habit of referring attorney's bills to be taxed; and, from time to time, laid down various rules upon the subject; thus, in *Springate* v. *Springate* (*E. T.*, 9 W. 3, *B. R.*, 1 Salk. 332), it is said, "no rule ought to be made for referring an attorney's bill delivered to his client, unless there be an action pending thereupon:" and in *Beal's Case* (*M. T.*, 10 W. 3, *B. R.*, 12 Mod. 252): "*Beal, an attorney* of the Court, sued in the Sheriff's Court for his fees, and, upon motion, he was forced to refer it to the Master, *for that his person is under the power of the Court*:" so in *Gregg's Case* (*E. T.*, 5 *An. B. R.*, 1 Salk. 89,) the Court refused to refer an attorney's bill to the Master, *because all the business was done in another Court*; otherwise had the business been done in this Court, or partly in this: and besides, the plaintiff

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right to tax bills for business done at the County Court and the Quarter Sessions, may be supported upon the construction of the Statutes 12 *G.* 2, c. 13, s. 7, and 22 *G.* 2, c. 46, s. 12 (*w*); which prohibit persons from practising in those Courts respectively, who are not admitted attorneys of the superior Courts, according to 2 *G.* 2, c. 23 (*x*); but there is no similar provision in the Central Criminal Court Act.

Cur. adv. vult.

TINDAL, C. J., now gave judgment.—The short question in this case is, whether, pending an action brought by an attorney of this Court for the recovery of his bill of charges for business done in the Central Criminal Court, a judge may make an order for the taxation of such bill upon the usual terms; and we are of opinion that such order may be made.

was an executor. The books from which these cases are cited, are certainly not of the highest authority; (as to *Salkeld*, see *per Curiam*, in *Byne* v. *Moore*, 5 Taunt. 190; and as to 12 Mod., the opinion of *Buller*, J., in *Rex* v. *Lyme Regis*, Doug. 83); but still, the cases themselves are not likely to have been the pure invention of the reporters. In *Style's Prac. Reg.*, p. 24 (ed. 1707, 6 *Ann*), it is said, "If an attorney, solicitor or counsellor, get writings into his hands upon account of any suit or cause depending, and refuse to re-deliver them, there being no fees due to them, the Court, upon motion, will compel a re-delivery of them without forcing the party to an action for such his writings; but if there be fees due to him, the Court will not force the delivery, until the fees, to be taxed by the Master of the office, be paid." But the course of proceeding before the Statute, as well as the object in passing that part of it now under consideration, is fully described in an *Anonymous Case* (2 Ves. sen., 451); "On motion, *Lord Chancellor* said, that before the making the Act of Parliament as to solicitors' bills, *the rule was, that, in a Court of common law, if application was made to tax an attorney's bill, it was not done without bringing the whole demand and money into Court, and then to have it taxed.* This was thought a great hardship on clients at the time of making this Act, because an attorney might make a very unreasonable bill, and put a burden on his client to raise it; the Act of Parliament, therefore, varied the rule, both of Courts of common law and equity, so that the client submitting to pay what should become due, the bill should be taxed, and that without bringing the money into Court." From these authorities (to which others might be added), it is obvious that the Courts did, *in fact*, refer attorneys' bills to be taxed before the Statute of Geo. 2; and, as no previous Statute appears to have given them the authority so to do, (the 3 J. 1, c. 7, merely requiring attorneys to give a bill of their charges to their clients), it seems to follow, that *the Courts have a common law jurisdiction to order the taxation of attorneys' bills.*

(*w*) The title of this Act is a legislative curiosity: "An Act to continue several Laws for preventing Exactions of the Occupiers of Locks and Weirs upon the river *Thames* Westward, and for ascertaining the Rates of Water Carriage upon the said River, and for continuing, explaining, and amending the several Laws *for the better Regulation of Attorneys* and Solicitors, and for regulating the Price and Assize of Bread, *and for preventing the spreading of the Distemper amongst the horned Cattle, and also for making further Regulations with respect to Attorneys and Solicitors, and for further preventing the spreading of the Distemper amongst the horned Cattle*, and for the more frequent return of Writs in the counties palatine of *Chester* and *Lancaster*, and for ascertaining the method of levying Writs of Execution against the Inhabitants of Hundreds, and for allowing *Quakers* to make Affirmation in Cases where an Oath is or shall be required."

(*x*) *Wardle* v. *Nicholson* was decided with reference to the 12 G. 2, c. 13, and *Sylvester* v. *Webster*, to the 22 G. 2, c. 46; but in the two earlier cases, in which it was held that a bill for business done at sessions was taxable (*Ex parte Williams*, and *Clarke* v. *Donovan*), no allusion was made to the last-mentioned Statute; see 1 N. & M. 359, n.

That the action is brought for the recovery of fees, charges, and disbursements *at law*, within the meaning of the Statute, appears to us to follow, from the consideration of the constitution of the Court in which the business was done. The Central Criminal Court is a common law Court of *oyer* and *terminer*, and general gaol delivery; a Court which has been held for centuries for the city of *London* and for the county of *Middlesex*, and which has been so far only altered and modified by the provisions contained in the late Statute 4 & 5 *W.* 4, c. 36, as is necessary for the purpose of comprehending certain defined parts of the adjacent counties within the jurisdiction of the Court.

The bill, therefore, falls within the first part of the 23d section of the 2 *G.* 2, c. 23, as a bill that must be delivered a month before an action brought: upon the same principle, that a bill, of business done at Quarter Sessions, has been held to fall within that provision of the Statute. And undoubtedly, the general understanding and practice in the profession has always been, that where the attorney's bill is necessarily to be delivered, under the Statute, before action brought, the same falls also within the second branch of the Statute, and may be referred to be taxed. One objection has been relied upon against the application of the Statute in this case, namely, that there is no taxing officer of the Central Criminal Court, whereas, at the Quarter Sessions, it is alleged there is a taxing officer, the Clerk of the Peace; but we think the Clerk of the Crown must be considered, for this purpose, as standing precisely in the same place as the Clerk of the Peace at the Quarter Sessions. The Clerk of the Peace is not, in strictness, a taxing officer as between the attorney and client, although his duty calls upon him to regulate the charges in the attorney's bill, as between the prosecutor and the county: and as he has been considered a taxing officer, there seems no real distinction between him and the Clerk of the Crown. But we rest our opinion principally upon the latter part of the 23d section, by which the judges of the respective Courts are required to "refer the said bill, and the attorney's demand thereupon, to be taxed, *although no action or suit shall be then depending in such Court touching the same*:" for we think those words do, by necessary implication, recognize the authority of the Court, as existing before and at the time the Statute was passed, to refer the attorney's bill to be taxed (*y*), where it is for charges of law, and where the attorney has brought his action to recover the amount, and such action is still depending in the Court to which application is made. We think, therefore, the present rule must be

Discharged.

(*y*) See note (*v*), *ante*, p. 265.

PITCHERS *v.* EDNEY.

June 13.

Where a stakeholder pays money into Court under an interpleader rule, and one of the litigant parties makes default in prosecuting his claim, the stake-holder was held entitled to his costs out of the fund.

J. MOUSLEY, having a leasehold estate to sell, employed the defendant, an auctioneer, for that purpose. The plaintiff became the purchaser, and paid 39*l.* 8*s.*, as a deposit, to the defendant; of this sum 5*l.* was advanced to *J. M.* by the plaintiff's assent; the auction duty was 5*l.* 8*s.*, and the

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balance, 29*l.*, remained in the defendant's hands. Owing to objections on the part of the plaintiff, that there had been a misdescription in the particulars of sale, he refused to complete the purchase, and brought the present action to recover the deposit. *J. M.* commenced an action against the plaintiff for the rest of the purchase-money: the defendant obtained a judge's order, under the Interpleader Act (*a*), that he might pay the 29*l.* into Court, and that *J. M.* should proceed with his action against the plaintiff at the then *Lent* Sittings. *J. M.* did not so proceed, but became insolvent; whereupon another order was made, rescinding the former order, and directing that *J. M.'s* claim against the defendant should be barred, and that the defendant might take the 29*l.* out of Court, and have four days time to plead.

Wilde, Serjt., on a former day in this Term, obtained a rule, calling on the plaintiff to shew cause why all further proceedings in this cause should not be stayed; why it should not be referred to one of the Masters to tax the defendant his costs in this action, together with his costs of, and occasioned by, his then application to the Court; why the defendant should not be at liberty to receive the amount of such costs out of the sum of 29*l.* paid into the hands of the Master under the said first-mentioned order, if the said sum of 29*l.* should exceed the amount of such costs, or the whole of the said sum of 29*l.*, if the costs should exceed that amount; why so much of the order, secondly above-mentioned, as directed that the defendant should be at liberty to take out of Court the said sum of 29*l.*, should not be discharged, and why the plaintiff should not be at liberty to take out of Court so much as should remain (if any), of the said sum of 29*l.*, after deducting therefrom the defendant's costs, when so taxed as aforesaid.

Erle now shewed cause, and argued, that there was no reason why the plaintiff, being equally innocent with the stakeholder, should pay the latter his costs. In *Lucas* v. *The London Dock Company* (*b*), the stakeholder was made to pay the costs.

Wilde, in support of the rule.—The stakeholder is entitled to his costs, in the first instance, out of the fund, which are to be ultimately paid by the unsuccessful party, *Duear* v. *Mackintosh* (*c*); *Cotter* v. *Bank of England* (*d*); *Parker* v. *Linnett* (*e*); *Dabbs* v. *Humphries* (*f*). In the present case the vendor has made default, and the Court will act as though he had gone on in his action and failed.

TINDAL, C. J.—The rule is as it has been stated on the authority of the cases cited, and the question now is, whether any alteration should take place in consequence of the default of one of the litigant parties. Without laying down any general rule upon this subject, I think it is reasonable, as between these parties, that the rule should be made absolute.

The other judges concurring,

Rule absolute.

(*a*) 1 & 2 W. 4, c. 58.
(*b*) 4 B. & Ad. 378.
(*c*) 3 Mo. & S. 174; 2 D. P. C. 730.
(*d*) 3 Mo. & S. 180: 2 D. P. C. 728.
(*e*) 2 D. P. C. 562.
(*f*) 1 N. C. 412.

DAVIS *v.* NUGEE.

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June 11.

Where the defendant, an attorney, had left his registered place of abode, and the plaintiff stuck up one copy of a rule *nisi* to compute on the door of the house, and another in the Master's office, the Court made the rule absolute.

MANSEL moved to make absolute a rule to compute. The defendant was an attorney of the Court. The affidavit of the party who went to serve the rule *nisi* upon the defendant stated that he had attended at the place of abode of the latter, as it was registered in the Master's office; that he found the house shut up, and was informed by the neighbours that the defendant was gone away, but they did not know where; a copy of the rule *nisi* had been stuck up on the door of the house, and also in the Master's office.

Rule absolute.

ENGLER, administrator of STULTZ, *v.* TWYSDEN, Bart.

June 13.

An affidavit, entitled "*A. B.*, assignee &c. v. *C. D.*" is insufficient.

A rule having been obtained, calling upon the plaintiff's attorney to enter the issue, and carry in the roll, without its being mentioned that the application had been previously refused at chambers, was discharged.

FITZJAMES had obtained a rule *nisi*, calling upon the plaintiff's attorney to enter the issue, and carry in the roll, and pay the costs of the application.

W. H. Watson shewed cause.—He took a preliminary objection to the title of the affidavit, "*J. Engler*, administrator, &c.," (without stating of whom or what), and cited *Steyner* v. *Coltrell* (*a*).

Fitzjames urged, that the present application was merely in continuation of the former proceedings in the action, and therefore, that the heading of the affidavit was sufficient; but,

TINDAL, C. J., referred to *Clark* v. *Martin* (*b*), and said, there must be a new affidavit; and this disposed of the question of costs.

Watson.—Supposing the affidavit were rightly entitled, the present application should have been against the plaintiff, and not against the attorney; it also appeared that the matter had been before a judge at chambers, who refused the application on the merits.

Fitzjames, contrà.

Per Curiam.—The previous application should, in common fairness, have been mentioned when the rule was moved for, the matter having been previously adjudicated upon.

Rule discharged.

(*a*) 3 Taunt. 377. (*b*) 3 D. P. C. 222.

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June 14.

The plaintiff, an attorney, endorsed the writ with the name of the firm of which he was a member:—*Held* a sufficient compliance with 2 W. 4, c. 39, s. 12.

DAWES *v.* SALOMONSON.

THE plaintiff in this case, being an attorney in partnership with Mr. *Frazer*, had issued a *capias* against the defendant, endorsed "*Dawes* and *Frazer*, attorneys for the plaintiff."

Butt had obtained a rule *nisi* to set aside the writ and bail-bond, upon entering a common appearance; upon the ground that such endorsement was irregular, under the 12th section of the Uniformity of Process Act (*a*).

Petersdorff shewed cause, and contended, that the firm being employed to transact the business, the endorsement was quite sufficient: he cited *Pickman* v. *Collis* (*b*), and *Hartley* v. *Rodenhurst* (*c*).

Butt, in support of the rule.—A man cannot be his own attorney; nor, being an attorney himself, can he employ the firm of which he is a partner. The writ should either have been endorsed as having been sued out by the plaintiff in person, or by Mr. *Frazer*, as his attorney.

TINDAL, C. J.—I am inclined to think the endorsement is sufficient, though it may not be strictly correct. It is by no means unfrequent that a bill of exchange is indorsed by *A.* to *A.* and Co., the firm of which he is a member In the present instance more information is given by the indorsement, than if it had stated that the writ was issued by *Frazer* only.

PARK, J.—It was the intention of the legislature that the attorney's name should be stated on the back of the writ, in order that the defendant might know where to go for the purpose of settling the action. The plaintiff here may be considered in two lights—as an individual, and as a member of the firm to which he belongs; and the indorsement in the name of the firm is quite sufficient.

VAUGHAN, J., of the same opinion.

COLTMAN, J.—The objection is of the very strictest kind. The Act contemplates two cases; one, where an attorney is employed, the other, where no attorney is employed: here, an attorney *is* employed, and therefore, the indorsement must be accommodated to the provisions of the first case.

Rule discharged.

(*a*) 2 W. 4, c. 39, enacting, that "every writ shall be indorsed with the name, &c., of the attorney actually suing out the same; but in case no attorney shall be employed, then, with a memorandum, expressing that the same has been sued out by the plaintiff in person, &c."

(*b*) 3 D. P. C. 429.

(*c*) 4 D. P. C. 748.

IRELAND *v.* THOMPSON.

Common Pleas.

June 14.

The defendant having pleaded *payment*, the Court upon the application of the plaintiff, who swore, that without the particulars of such payment, he could not safely proceed to trial, made an order that the defendant should deliver such particulars.

ASSUMPSIT. The defendant pleaded (*inter alia*), a plea of payment.

Wilde, Serjt., had obtained a rule *nisi* that the defendant should deliver particulars, stating the times at which the payment had been made, or, in default of so doing, that the plea of payment should be struck out; his affidavit stated, that the plaintiff could not safely proceed to trial without such particulars.

Greaves shewed cause.—There is no precedent for such an application.—[*Tindal*, C. J.—Is it not as reasonable that a plaintiff should have the particulars of a payment as of a set-off?]—In the case of set-off, both parties are treated as debtors. The right of set-off is given by Statute (*a*), for the purpose of consolidating actions; and the Courts, in the case of a defendant, did no more than what they had been in the habit of doing in the case of a plaintiff, in compelling him to deliver the particulars of his demand (*b*). The rule *T.*, 1 *W.* 4, s. 6, requires that "a copy of the particulars of the (plaintiff's) demand, and also particulars (if any), of the defendant's set-off, shall be annexed to the record," and, upon the principle of the maxim *expressio unius est exclusio alterius*, it must be presumed, that the learned framers of those rules did not recognize the right of either party to any other particulars than those mentioned.

Wilde, in reply, was stopped by the Court.

TINDAL, C. J.—I think there is nothing unreasonable in this application, although it be one *primæ impressionis*; the plaintiff swears, that without these particulars, he cannot proceed with safety, to the trial of the cause; under these circumstances the present application will be granted; though we do not wish to lay down a general rule that we shall enforce the delivery of particulars in all cases where payment is pleaded.

Rule absolute (*c*).

(*a*) 2 G. 2, c. 22, s. 13.

(*b*) The first case in which an order for the plaintiff to deliver the particulars of his demand appears to have been made, was in *Le Breton* v. *Braham* (3 Burr. 1389; *E. T.* 3 G. 3, *A. D.* 1763), where the plaintiff, being an attorney, was peculiarly subject to the jurisdiction of the Court; but Lord *Mansfield*, C. J., took occasion to say, he "thought it reasonable that, in *all* cases (as well where attorneys were plaintiffs as where other persons were plaintiffs), the plaintiff ought to give the defendant an account of the particulars of his demand:" and the practice seems to have been uniform from this time. The Statute of Set-off enacts, that where there are *mutual debts*, one debt may be set against the other, and such matter may be given in evidence *under the general issue*, or *pleaded in bar*; it is observable, however, that in case the defendant adopted the former course, he was to give *notice* "of the particular sum or debt so intended to be insisted on, and *upon what account it became due*;" which latter clause would seem to have given the Courts authority to enforce the delivery of particulars of the set-off. A set-off must now, in all cases, be *specially pleaded*. See *R. H.*, 4 W. 4; *Pleadings in particular Actions*, *Assumpsit*, 3; *Graham* v. *Partridge* (2 Gale, 37; 1 M. & W. 295; 5 D. P. C. 108.)

(*c*) See *Bulnois* v. *Mackenzie* (4 Bing. N. C. 127; 6 D. P. C. 215),

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where, in an action for infringing a patent, the defendant gave notice of objections to the patent, as he was bound to do, under the new Patent Act (5 & 6 W. 4, c. 83, s. 5), and this Court decided that, in their common law jurisdiction to model the proceedings in a cause before them, which extended as well to a defendant as to a plaintiff, they would see that the defendant *fairly* disclosed the nature of his objections; but they would not compel him to give the names and addresses of parties who were said to have used the invention before the plaintiff's patent.

June 13.

DAVIES and Wife, demandants, LOWNDES, tenant.

The Court will not change the *venue* upon affidavits stating that one of the parties had large estates in the county, and had great influence there.

THIS writ of right to recover lands in *Buckinghamshire* was tried at the bar of this Court, on the 27th and 28th of *April*, 1835 (*a*), when the verdict passed for the tenant; upon a bill of exceptions to the ruling of this Court, the Court of *Exchequer Chamber* granted a *venire de novo* (*b*).

Sir *W. W. Follett*, Q. C., had obtained a rule *nisi* to award the jury process into *Middlesex*, or some other county than *Bucks*, upon an affidavit that, previous to the former trial, the deponent had attended upon several persons, eligible to serve as knights to choose recognitors, and that he experienced much difficulty in procuring them to attend; many of them excusing themselves and expressing their wish not to attend, owing, as they stated, to their being connected and on terms of intimacy and friendship with the tenant; that some of them expressed their opinion upon the claim of the demandants; that the deponent had cause to believe that strong prejudice existed against the claim of the demandants throughout the county of *Bucks*; that the tenant was in the actual possession or receipt of the rents of the estates and lands in question in the cause, which were all situate in *Bucks*, and was also possessed of other large estates in the same county; that he had a large connection, and also many relatives and friends residing within the county of *Bucks*, all of whom, as well as the tenant, possessed much influence throughout the county; that the tenant had represented the county in Parliament; and that he and one or more of his sons, were in the commission of the peace for the county, and were all on terms of intimacy with the gentry, and particularly such as were competent to serve as knights or recognitors, as also with those residing in the adjoining counties; that the demandant was born and resided in *Wales*, as did all her ancestors, through whom she claimed, and that she and they were entire strangers to any person within the county of *Bucks*; that, as the trial of the issue had been ordered at the bar of this Court, much expense, and probably delay, would be saved to all parties, if the writ of summons and other jury process should be awarded to the Court of *Middlesex* instead of *Bucks*.

R. V. Richards shewed cause, and contended, that there was nothing in the affidavit to induce the Court to grant the rule, as it amounted to no more

(*a*) See 1 Hodg. 125; 1 N. C. 597; 2 Scott, 71.

(*b*) See *ante*, 217; 4 N. C. 478.

than saying that the tenant was a man of property, and was acquainted with several persons who were liable to serve as knights or recognitors.

Follett, and *E. V. Williams*, in support of the rule, cited *Lord Gerrard* v. *Spencer* (*c*); *Sir William Tyrringham's Case*, cited in the *Earl of Kildare* v. *Eustace* (*d*); and *Lord Shaftesbury* v. *Graham* (*e*).

(*c*) Cited in *Lord Shaftesbury* v. *Graham* (*ut infra*), where the plaintiff, "being a man of interest" in the county of *Lancaster*, where the lands lay, and "where he and his ancestors had long lived, and kept great hospitality, and did every body welcome," *Hale*, C. B., "made them turn their *ejectione firmæ* into a feigned issue, to try it in another place, for indifference sake."

(*d*) 1 Vern. 437: Sir *William* being so powerful, that right could not be had against him in the county of *Bucks*, the *venue* was changed upon a bill brought in Chancery purely for that purpose.

(*e*) Skinner, 43; S. C. 2 Jones, 198; 1 Vent. 364; 2 Show. 475. The plaintiff in this action was *Anthony Ashley Cooper*, the first Earl of that title, who has obtained a questionable notoriety in history for the versatility of his talents and principles. In his youth, when the conflict was raging between King *Charles* the first and his Parliament, he engaged zealously on behalf of the former; but as the interest of the Parliament became ascendant, he deserted the King, and insinuated himself into the good graces of *Cromwell*, whom he served with equal fidelity till the eve of the restoration; when, by a timely concession of opinion, he obtained the favour of the returning monarch; he was an active member of the famous *Cabal* ministry in 1670; and subsequently, when the king was more than usually pressed for money, devised the notable scheme of closing the *Exchequer*, by execution of which the nation narrowly escaped bankruptcy; as a reward for this loyal service, he was raised to the peerage as Lord Treasurer, and soon afterwards, on the dismissal of Sir *Orlando Bridgman*, was made Lord Chancellor; as a judge, he is said to have been unexceptionably honest; and as a minister, he was always ready to support the unconstitutional projects of his master to the utmost; and indeed, when at last *Charles*, wearied by the opposition of his Parliament, recalled his declaration of indulgence, *Shaftesbury*, shocked at his royal master's want of firmness, instantly abandoned him, and joined the intrigues of the country party, who were then distinguished by their somewhat indiscriminate hatred of every thing that savoured of popery: he was soon after removed from the Chancery; and getting embroiled with the House of Lords, he was committed to the Tower, and his motion to the *King's Bench* for a *habeas corpus* gave rise to one of the most interesting discussions upon the privilege of Parliament (see 2 *St. Tri.*, 616, fo. ed.) He entered largely into the intrigues for superseding the *Duke of York*, and obtaining the succession for the *Duke of Monmouth*, one of the King's bastard sons. By his violent enmity to popery, he rendered himself a great favourite with the people, and consequently, obnoxious to the high church party; but, in forming a new council in 1679, the King found it necessary to appoint him the president, from which situation, however, he was soon displaced. In the following year he took the extraordinary step of presenting the Duke of *York* to the grand jury of *Middlesex* as a popish recusant, and, as a sort of political retribution, he was, the year after, himself indicted for high treason at the *Old Bailey*: on this occasion, the counsel for the Crown applied that the evidence before the grand jury might be given in open Court, and notwithstanding that the jury strenuously urged that such a proceeding was contrary to the tenor of their oaths, which bound them to secrecy (See *Rex* v. *Marsh*, 2 Har. & Wol. 366; 1 Wil. Wol. & Dav. 150; 1 N. & P. 187), both the chief justices (*Pemberton* and *North*), decided that such had always been the practice, when desired by the Crown; and the examination of the witnesses consequently took place in public. The grand jury returned the bill *ignored*, news very much, as it would seem, to the satisfaction of the audience, who "fell a hollowing and shouting," whereupon the Attorney General (Sir *Robert Sawyer*), moved that "it be recorded, this hollowing and hooping in a Court of justice;" (see 3 *St. Tri.*, fo. ed. pp. 417—442.) After his discharge, Lord *Shaftesbury* brought an action of *scandalum magnatum* against one *Cradock*, for saying the Earl was

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Per Curiam.—There must be a stronger reason than any adduced upon the present occasion, to induce the Court to accede to such an application.

Rule discharged.

a traitor, (see 2 Jones, 192; 1 Vent. 363; Skin. 40); and also the action for a malicious prosecution, mentioned in the principal case, against one *Graham*, and the same *Cradock*, in both of which actions the defendants moved to change the *venue*, upon affidavits that the plaintiff had great interest with the juries and sheriffs of *London*; that one of the latter, *Pilkington*, was master of the company of *Skinners*, of which the plaintiff was a freeman; and that several material witnesses durst not come to *London*, for fear of their lives. In both instances the Court granted the application, not being unmindful that they were affronted themselves when they were at the *Old Bailey* upon the before-mentioned indictment. The *Earl* did not prosecute his actions; and, after another unsuccessful conspiracy in favour of the Duke of *Monmouth*, he retired to *Holland*, where he lived privately, and soon afterwards died forgotten, (*A. D.* 1683).

June 14.

SCOTT *v.* STALEY.

In *debt* on bond, the plaintiff having assigned a breach in his replication:—*Held*, that a *general venire* was proper, under 8 & 9 W. 3, c. 11, s. 8.

DEBT on bond. The defendant craved *oyer* (by which the condition appeared to be, to secure the payment of 300*l.* by instalments), and pleaded, *first*, payment, and *secondly*, that the bond was obtained by fraud.

Replication, to the first plea, that the defendant did not duly pay, &c., but on the contrary thereof, heretofore, &c., to a large sum of money, to wit, &c., for three of the said instalments, become due and in arrear, &c. (*a*); to the second plea, a traverse of the fraud. The *venire* was general, "to make a jury between the parties." The plaintiff had a verdict.

Chandless obtained a rule *nisi* for an arrest of judgment, or a *venire de novo*, on the ground that, under the 8 & 9 *W.* 3, the *venire* should have been special, *ad triandum quam ad inquirendum* (*b*).

Barstow shewed cause.

Bayley (*amicus Curiæ*), referred to *Quin* v. *King* (*c*), where it was held, in an action on a bond, in which the breaches were assigned *in the declaration*, that the jury, upon *non est factum* pleaded, might assess the damages on the award of the usual *venire* to try the issues (*d*).

THE COURT said they could not distinguish that case from the present, and discharged the rule.

(*a*) That this assignment of the breach is sufficient under 8 & 9 W. 3, c. 11, s. 8, without stating it to be "according to the form of the Statute," see *Tombs* v. *Painter* (13 Ea. 1.)

(*b*) See 3 Chit. Pl. 1287; 1 T. Chit. Pr. Forms, 151.

(*c*) 1 Gale, 407; 1 M. & W. 42; 4 D. P. C. 736.

(*d*) See also *Perkins* v. *Hawkshaw* (2 Stark. 381,) S. P.

PHILLIPS *v.* EARDLEY.

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June 14.

Where issue was joined in *Easter Term*, and notice of trial given for the second Sittings in *Trinity Term*, which was countermanded: *Held*, it was too soon to apply in the same Term for judgment as in case of a nonsuit.

ATCHERLEY, Serjt., had obtained a rule *nisi* for judgment as in case of a nonsuit. Issue was joined in last *Easter Term*; notice of trial was given for the second Sittings in the present Term, which notice had been since countermanded.

Humphrey shewed cause.—He contended the application was premature, and cited *Isaacs* v. *Goodman* (*a*); *Marshall* v. *Foster* (*b*); *Preedy* v. *Macfarlane* (*c*).

TINDAL, C. J., referred to *Da Costa* v. *Ledstone* (*d*), where this Court laid down the rule, that a defendant could not apply for judgment as in case of a nonsuit, before the third Term.

Atcherley, in support of the rule, argued that, a default having been committed by the plaintiff before the motion was made, by the countermand of the trial, the present application was not made too soon.

TINDAL, C. J.—We had better adhere to the rule, as laid down in *Da Costa* v. *Ledstone*.

Rule discharged: the costs to be costs in the cause.

(*a*) 1 C. & M. 494; 2 D. P. C. 34.
(*b*) 2 C. & M. 213; 2 D. P. C. 228.
(*c*) 2 C. & M. 213; 2 D. P. C. 216.
(*d*) 2 H. Bl. 558.

STAPLES and another *v.* HOLDSWORTH.

June 14.

The defendant, having acted as agent for the plaintiffs, left their employment in 1827, and gave up his accounts, in which he debited himself to the amount of 3,000*l.* for monies received for them. In the same year they commenced an action against him for that sum, and delivered particulars of demand, framed upon the accounts he had given in; but no further steps were taken till the early part of 1837, when they demanded a plea; they subsequently discovered that the defendant had received various other sums for which he had not accounted:—*Held*, that the plaintiffs were entitled to amend their particulars, by the insertion of these sums, the defendant having liberty to plead the Statute of Limitations to the new items of demand.

THIS was an action for money lent, &c., arising from the following circumstances. The plaintiffs carried on trade at *Mexico*, and one of the partners resided there; in 1823, the defendant went out there in their employment, and was placed at the head of the counting-house department; in 1825, the resident partner returned to *England*, and the defendant was left in the entire management of the business there under a power of attorney, and kept all the books, &c. In 1827 he left the employment, and gave up the books to the plaintiffs, and in *August*, in the same year, he was arrested by the plaintiffs for 3,000*l.*, for which amount he had debited himself in the said books: particulars of demand were afterwards delivered, amounting to 7,000*l.* The plaintiffs were abroad for some period; no further step was taken in the action till *September*, 1836, when a Term's notice of proceeding was given; and in *March*, 1837, a demand of plea was made. The plaintiffs, having subsequently discovered that the defendant had received various sums of money, for which he had not accounted, on the 1st of last *December* took

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out a summons before a judge to amend their particulars; the summons was attended on the 5th of *December*, and was resisted by the defendant on the ground that the particulars, if amended, would introduce a new demand against the defendant, which would otherwise be barred by the Statute of Limitations; whereupon the learned judge made an order; "that the plaintiffs should be at liberty to amend the particulars of their demand, the defendant being at liberty to plead the Statute of Limitations to any new items introduced into their amended particulars."

The amended particulars contained items in the years 1825 and 1826, and raised the plaintiffs demand to 25,000*l.* Since the order, the defendant had obtained a commission to examine witnesses.

Maule, Q. C., in last *Easter* Term, obtained a rule *nisi* to set aside the above order, on the ground that, by the lapse of time occasioned by the plaintiffs' delay, several of the defendant's witnesses had died.

Wilde, Serjt., now shewed cause.—It was owing to the defendant's own misconduct, in not inserting in his accounts all the monies he had received, that the necessity arose for amending the plaintiffs' particulars. After having obtained a commission to examine witnesses, he could not complain of delay.

Greenwood, in support of the rule.—If the plaintiffs are allowed now to amend their particulars, it would be substantially permitting them to bring a fresh action; a plaintiff is always bound by his particulars, *Holland* v. *Hopkins* (*a*), which are only an amplification of the declaration, as that was formerly only an amplification of the original writ, setting forth the plaintiff's cause of complaint, with the additional circumstances of time and place, 3 *Blac. Com.* (*b*); *per Alderson*, B., in *Dawes* v. *Anstruther* (*c*); and the Courts have uniformly refused to allow amendments to be made in the declaration, when there has been delay on the part of the plaintiff; *Goff* v. *Popplewell* (*d*); *Steel* v. *Sowerby* (*e*); *Green* v. *Milton* (*f*); or where he has sought to introduce a new cause of action, *Brown* v. *Crump* (*g*); *Sweeting* v. *Halse* (*h*);—[*Tindal*, C. J.—The delay, in this case, must have taken place with the assent of the defendant, for he might at any time have driven the plaintiff on, if he had chosen.]—There is a great difference between active and passive delay; the defendant was not bound to take any steps. Where such amendments have been allowed, it has always been under peculiar circumstances, which do not apply to the present case; he cited and distinguished *The Executors of the Duke of Marlborough* v. *Widmere* (*i*); *Doe*, dem. *Hardman* v. *Pilkington* (*j*); *Freen* v. *Cooper* (*k*); *Billing* v. *Flight* (*l*); *Horston* v. *Shilliter* (*m*); *Atkinson* v. *Bell* (*n*). In *Breekon* v. *Smith* (*o*), indeed, the Court allowed the particulars to be mended, even after action;

(*a*) 2 B. & P. 243.
(*b*) P. 293.
(*c*) 5 D. P. C. 740.
(*d*) 2 T. R. 707.
(*e*) 6 T. R. 171.
(*f*) 4 B. & Ad. 369; 1 N. & M. 673.
(*g*) 6 Taunt. 300.
(*h*) 4 M. & R. 383.
(*i*) Fitzg. 193; 2 Stra. 890; 1 Barn 408, 418.
(*j*) 4 Burr. 2447.
(*k*) 6 Taunt. 358.
(*l*) *Ib.* 419.
(*m*) 6 Moo. 490.
(*n*) 2 M. & R. 293; 8 B. & C. 283.
(*o*) 1 Ad. & El. 488.

but that was only for the purpose of adapting them to the cause of action which had been proved, and not for the purpose of introducing a new cause of action.

TINDAL, C. J.—All the cases that have been cited, where the Court has refused leave to amend, are cases where the application was to amend the record, by inserting new counts in the declaration; and such applications have been refused on the score of the prejudice with which they would affect the defendant. But these cases will not govern the present, unless we are to consider that the amendment of a bill of particulars is the same thing as the amendment of a record. Now, it appears to me that they stand upon a different ground, and that the discretion of the Court is to be governed very differently in the two cases. If an application to amend the record, by inserting a new cause of action, were allowed in a case where, but for the amendment, the Statute of Limitations would be a bar to such cause of action, it would deprive the defendants of the benefit of the Statute; but there is this distinction between such a case and one where the plaintiff merely seeks to amend his particulars, that, in the latter case, the plaintiff having brought his action, the allowing his particulars to be amended, will not prevent the Statute from operating upon any claims which would otherwise have been barred. If we were to yield to the objections made by the defendant in this case, we should, in effect, say, that the Statute of Limitations ought to apply, not to the time when the action was brought, but to the time of the delivery of the bill of particulars. The question then, in the present case, resolves itself to this: whether, under all the circumstances, it is equitable and reasonable that the plaintiff should be allowed to amend his particulars. There are many cases in which to refuse such an application would work great injustice; as if the plaintiff had omitted items in his particulars, from a mistake in turning over a leaf of his ledger, from which he made them up; or if the defendant had been guilty of misconduct, in wilfully keeping back from the knowledge of the plaintiff those facts which were necessary to enable the latter to state his claims correctly. Now, without imputing such misconduct to the defendant on the present occasion, we find, that the ground of the plaintiffs' application is, that they shaped their bill of particulars from the accounts which they received from the defendant, but that a subsequent discovery has shewn a mistake on his part, and that he had received other moneys besides those sums with which he had charged himself in the plaintiffs' books. I think, therefore, there is no reason why they should not be permitted to amend a mistake, which had originated under such circumstances.

PARK, J.—I am of the same opinion, and think, if the Court were to do what the defendant requires of them, and discharge the present order, they would act against all the former practice, as long as I can remember it. His Lordship referred to 2 *Arch. Prac.* 878.

VAUGHAN, J.—I entertain no doubt upon this question. It has been argued upon the supposition that the plaintiff was seeking to introduce a new count; but that is not so, for the declaration will stand exactly as before. What are the circumstances of the case? The defendant is acting as the plaintiffs' agent abroad, and they are entirely in his hands; when he leaves

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their employment, he sends them a wrong account, from which they make out their bill of particulars; they afterwards discover that there has been a suppression of facts on the part of the defendant, and the only question is, whether the plaintiffs are to be allowed to improve their particular of demand. They do not seek to set up a new cause of action; and even if they did, the defendant could not be damnified, as, by the terms of the order, he is allowed to plead the Statute of Limitations.

COLTMAN, J.—Generally speaking, the application to amend particulars, is pretty much a matter of course; but where it is shewn that there has been delay on the part of the plaintiff, a judge would pause before he granted it, and I do not know that absence from the country would purge that delay; but the fact that weighs with me in the present case, is the subsequent discovery of matters which ought to have been disclosed by the defendant. There does not appear to be any imputation of fraud upon him; but as he ought to have disclosed the whole account, the plaintiffs are, I think, fully entitled to amend their particulars.

Rule discharged.

June 12.

HAWORTH *v.* WHYTE.

Where the defendant, towards the close of the Term, pleaded a plea obviously frivolous and bad, the Court ordered the case to be called on on the last day of Term, upon the plaintiff's giving notice thereof to the defendant; and intimated that no demurrer books need be delivered.

DEBT, by the drawer against the aceeptor of a bill of exchange.

Plea, that there was no value or consideration for the defendant's acceptance of the said bill, and that the plaintiff, to wit, on the day and year aforesaid, indorsed and delivered the said bill to a person to the defendant unknown, and that the defendant, when the said bill became due and payable, paid the amount thereof to that person; and that the defendant had also, before the commencement of the suit, paid to the plaintiff divers sums of money, sufficient to pay and satisfy him the full amount of the said bill; concluding with a verification. *Special demurrer* and *Joinder*.

Peacock applied for a rule *nisi*, that judgment in demurrer might be given for the plaintiff, upon the ground that the plea was obviously frivolous and bad, and was only granted for the purpose of provoking a demurrer, so as to throw the plaintiff over the long vacation.

TINDAL, C. J.—Let the case be called on on the last day of Term, the plaintiff giving notice thereof to the defendant. No demurrer books need be delivered.

Rule accordingly.

Peacock, on the last day of Term, no one appearing for the defendant, prayed for, and obtained judgment for the plaintiff.

Doe, dem. Barnes, *v.* Francis Roe and others.

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June 7.

A., having entered into a contract with *B.* for the purchase of an estate, by an ante-nuptial settlement, reciting such contract, covenanted, if *B.* should be enabled to convey the estate to him, that he would convey the same to the trustees under the settlement; provided, that if *B.* should not be able to convey, *A.* should be under no obligation to procure a conveyance from any other party, or to pay its value to the trustees: nor should *A.* be precluded from purchasing the estate for his own benefit. *B.* was not able to convey; and *A.*, after his marriage, purchased the estate from the owner, and then conveyed it to the trustees under the marriage settlement; he afterwards mortgaged the estate to *C.*, in fee for 10,000*l.*: subsequently the mortgage was transferred to *D.*, the deed stating the consideration to be 10,000*l.*, paid to *C.*, and 4,000*l.*, paid to *A.*; the payment of the former sum was proved, but not that of the latter. *D.* mortgaged to the plaintiff:—*Held*,

First, that the *post*-nuptial settlement was voluntary, and consequently void as against a purchaser for a valuable consideration;

Secondly, That there was sufficient proof of a valuable consideration for the transfer to *D.*

Thirdly, That an *ad valorem* stamp in respect of 4,000*l.* was sufficient upon the mortgage to *D.* (*a*).

EJECTMENT; tried before *Bosanquet*, J., at the Summer Assizes for *Buckinghamshire*, 1837. The case was this:

Higginson devised the estate in question to trustees for sale; after his death, the estate was sold by auction, and *Clowes* became the purchaser; objections having been raised to the title, the trustees, in 1805, filed a bill for specific performance against *C.*, which in *July*, 1808, was dismissed. In the following *November*, *C.* filed a similar bill against the trustees, which was also dismissed in 1813 (*b*). Pending this suit (in 1812), *C.* sold to *Whittington* some land adjoining the estate in question, and by the deed of conveyance, reciting the contract with *H.'s* trustees, and the Chancery suits, *C.* covenanted, within three months after the estate in question should be conveyed to him under such contract, to convey the same to *W.* for 150*l.* In 1816, *W.* conveyed certain lands to the use of *Medley*, and agreed that the estate in question should, when *C.* should become enabled to convey the same, be conveyed to the use of *M.* In 1818, *M.*, by an *ante*-nuptial settlement, conveyed certain estates to the defendants upon the marriage trusts, and agreed that the estate in question "in case *C.* should so become enabled to convey the same," should be conveyed to the defendants upon the same trusts, and covenanted that he would, "in case *C.* should so become enabled to convey," pay to him the said sum of 150*l.*, "and would, in such last-mentioned case, at his own costs, &c., cause the same to be conveyed" to the use of the defendants; and it was therein provided, "that if *C.* should not be enabled to make such conveyance, &c., as aforesaid, then, no obligation or liability should attach on *M.*, his heirs, &c., to procure, or endeavour to procure, a conveyance from any other person, or to pay the value of the same, or the said sum of 150*l.* to the defendants by way of satisfaction for the said

(*a*) See *Barham* v. *Earl of Thanet* (3 Mylne & Keene, 607,) where a mortgage was made of the manor and lands of *S.* and other valuable estates, to secure a debt of 80,000*l.*, and interest. The mortgagor died intestate, leaving the debt wholly unpaid; and his heir, being pressed to pay off 30,000*l.*, part of the 80,000*l.*, procured a person to advance the sum required for the purpose, and the original mortgagee thereupon joined with the heir of the mortgagor in a deed, assigning 30,000*l.*, part of the 80,000*l.*, and conveying the manors and lands of *S.* to the person making the advance, subject to a proviso for redemption at the end of five years, being an equity of redemption altogether different from the prior equity of redemption, and the interest reserved being five *per cent.* instead of four and a half *per cent.*, which was the rate reserved in the original mortgage. The Master of the Rolls held that, in substance, this was not an assignment, to the extent of 30,000*l.* of an original mortgage, with an auxiliary security; but a release, by the original mortgagee of the lands from the original mortgage, and a new mortgage of them by the heir, and that the 30,000*l.* was thereby constituted his personal debt, as between his real and personal representatives. See also *Lant* v *Price*, 1 Will. Wol. & Hodg. 271; 3 N. & P. 329.

(*b*) See 15 Ves. 516; 1 Ves. & B. 524.

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hereditaments; nor should *M.*, his heirs, &c., be precluded or disabled from purchasing the same, for his or their own benefit." In *June*, 1818, after the marriage of *M.*, he obtained a conveyance of the estate from *H.'s* trustees; and in 1819, by deed of settlement, reciting the agreement with *C.; that C. had not been enabled to convey;* that *M.* had purchased of the owners, and that he was desirous of conveying to the uses of his marriage settlement; he conveyed the estate to the defendants in trust accordingly. In 1823, *M.* mortgaged the estate (with others), in fee, to *B. D'Aranda*, in consideration of 10,000*l.* In 1828, by indentures of lease and release, stating the consideration to be the payment of 10,000*l.* to *D'A.*, and of a further sum of 4,000*l.* to *M.; D'A.*, under *M.'s* direction, conveyed, and *M.* confirmed, to *Ouvry* and others, the mortgaged estate, "freed and absolutely discharged from the proviso for redemption" contained in the mortgage to *D'A.*, but subject to a new proviso for redemption and re-conveyance, on payment by *M.* to the new mortgagees of 14,000*l.* with interest, at a day certain. In 1830, in consideration of 15,000*l.*, the mortgage was transferred to *Barnes*, the lessor of the plaintiff.

The mortgage to *D'A.* was stamped with an *ad valorem* stamp for 10,000*l.*; but the mortgage to *O.* with an *ad valorem* stamp for 4,000*l.* only.

The payment of the 10,000*l.* upon the transfer to *O.*, was proved to have been made by bank notes, in the presence of *M.;* but the witness to prove the payment of the 4,000*l.* to *M.*, could only speak to a check to that amount having been given. The verdict having passed for the lessor of the plaintiff,

B. Andrews, Q. C., in last *Michaelmas* Term, pursuant to leave reserved, obtained a rule *nisi* to set it aside, and enter a nonsuit, on three grounds; first, that the estate vested in the defendants under the *post*-nuptial settlement, which was not a voluntary or fraudulent conveyance; secondly, that the mortgage to *O.* ought to have had a 1*l.* 15*s.* transfer stamp, in addition to the *ad valorem* stamp, under the Statute 3 *G.* 4, c. 117, s. 2 (*c*); and thirdly, that there was not sufficient evidence that the lessor of the plaintiff was a purchaser, for a valuable consideration, and therefore, even supposing the post-nuptial settlement should be considered voluntary, it was good against him (*d*).

Wilde, Serjt., *Storks*, Serjt., and *Gunning*, shewed cause in *Hilary Term*.

First, The conveyance under the *post*-nuptial settlement was void, as being voluntary, and without consideration: *Medley*, by the express terms of the *ante*-nuptial settlement, was under no obligation or liability to execute such a conveyance, if (as the fact turned out) *Clowes* was unable to convey; and

(*c*) Enacting, that "upon any transfer, &c., of any mortgage, provided no further sum be added to the principal already secured, there shall be paid a stamp duty of 1*l.* 15*s.* for the first skin or sheet, and for every 1080 words over and above the first 1080 words, a progressive duty of 1*l.* 5*s.*, and if any further sum shall be added to the principal already secured, the *ad valorem* duty payable under the 55 G. 3, c. 184, shall be charged only in respect of such further money."

(*d*) By 27 El. c. 4, Fraudulent conveyances are void against the persons intended to be defrauded thereby, and subsequent purchasers, for a valuable consideration. *Voluntary* conveyances have always been held fraudulent within this Act. See *White* v. *Lansom*, 3 Atk. 410. In *Chapman* v. *Emery*, 1 Cowp. 278, a *post*-nuptial settlement was held to be void, as a voluntary conveyance, against a subsequent mortgagee, though he had notice of the settlement.

although a very slight consideration would be sufficient to support such a conveyance, here there was actually none. A consideration does not mean merely an impelling motive. They referred to *Langridge* v. *Dorville* (*e*).

On the second point, they relied upon *Doe*, dem. *Bartley* v. *Gray* (*f*).

As to the third point, as the lessor of the plaintiff claimed under *Ouvry*, and the evidence was clear as to his having paid 10,000*l.* to *D'Aranda*, in *Medley's* presence, that was sufficient proof of a valuable consideration. They were stopped by the Court.

B. Andrews, in support of the rule.—First, this was not like the case of a settlement, in consideration merely of natural love and affection, which would undoubtedly be void, *Doe*, dem. *Otley* v. *Manning* (*g*). There was a good consideration here, arising out of the previous covenant by *Medley*, contained in the *ante*-nuptial settlement; and although *Clowes* was not able to convey the estate, it was immaterial whether *Medley* took it from him, or from the testator's trustees; the settlement was a virtual execution of the former covenant; and the Courts, where a transaction is fair and honourable, have always supported it, though the consideration has been of the slightest kind, *Roe*, dem. *Hamerton* v. *Milton* (*h*); *Hill* v. *The Bishop of Exeter* (*i*). The case of *Ex parte Berry* (*j*), is very strong in favour of this position; there the giving up of a bond which was void, by reason of its being voluntary, was held to be a good consideration for a second bond.

Secondly, as to the stamp, *Doe*, d. *Bartley* v. *Gray*, is not an authority for the plaintiff, for in that case there *was* a 1*l.* 15*s.* deed stamp; and it was expressly stated by the Court that such stamp was sufficient to answer the purpose of a *transfer*-stamp, being of the same amount.

Thirdly, the lessor of the plaintiff has not shewn himself to be a purchaser for valuable consideration, which he was clearly bound to do, before he could rely upon any supposed invalidity in the post-nuptial settlement; *Doe*, d. *Sweetland* v. *Webber* (*k*). Supposing, therefore, the settlement were voluntary, so, as far as it appears, is the conveyance to *Barnes*, and the purchaser under one voluntary conveyance, will not be permitted to oust a former purchaser, though also under a voluntary conveyance.

TINDAL, C. J.—Our present impression is with the plaintiff, especially upon the last two points; but we will look at the deeds, and if they change that impression, we will hear the plaintiff again.

Cur. adv. vult.

TINDAL, C J., now gave judgment, and, after stating the facts, proceeded thus:—

Upon this state of facts three questions were raised: first, whether the settlement by *Medley* after his marriage was voluntary; secondly, whether the transfer of the mortgage to *Ouvry* required a stamp of 1*l.* 15*s.*, in addition to the *ad valorem* stamp for 4,000*l.*; and thirdly, whether there was

(*e*) 5 B. & A. 117.
(*f*) 1 Har. & Woll. 235; 3 Ad. & El. 89; 4 N. & M. 719. See also *Doe*, dem. *Williams* v. *Edwards*, 1 Har. & Woll. 237, n.
(*g*) 9 Ea. 59.
(*h*) 2 Wils. 356.
(*i*) 2 Taunt. 69.
(*j*) 19 Ves. 218.
(*k*) 1 A. & E. 733; 3 N. & M. 586.

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sufficient proof that *Barnes*, the lessor of the plaintiff, was a purchaser for a valuable consideration.

The second point, which relates to the stamp, has been already decided by the case of *Doe*, dem. *Bartley* v. *Gray* (*l*), by which it was determined that, according to the true construction of 3 *G.* 4, c. 117, where a mortgage term is transferred upon a further advance of money, an *ad valorem* stamp upon such advance is sufficient, without the addition of any stamp in respect of the transfer of the original mortgage.

With respect to the third point, the payment of 10,000*l.* in bank notes to *D'Aranda*, upon the transfer to *Ouvry*, under whom *Barnes*, the lessor of the plaintiff, claims, is sufficient to make him a purchaser for a valuable consideration, whether the additional 4,000*l.* was or was not actually paid to *Medley*. Upon these two points the opinion of the Court was intimated whilst the case was under discussion.

On the first point, the Court expressed a wish to look at the deeds; and upon examination of them, it very clearly appears to us that *Medley* was under no obligation, either in law or equity, to transfer to the trustees of his marriage settlement the land which, in consequence of the inability of *Clowes* to convey it, he had purchased of the original owner, without the intervention of *Clowes;* and consequently, such settlement being made after marriage, was purely voluntary, and void against a *bonâ fide* purchaser for a valuable consideration.

We, therefore, think the rule for setting aside the verdict for the plaintiff, and entering a nonsuit, should be discharged.

Rule discharged.

(*l*) *Ut supra.*

June 13.

FISHER *v.* DEWICK and another.

In an action for infringing a patent, the defendant's particular of objections must be distinct and definite.

CASE for infringing a patent obtained by *W. S.* for making bobbin-net lace, and assigned by him to the plaintiff.

Pleas, first, Not Guilty; *second,* that *W. S.* did not, by an instrument in writing, describe the nature of his alleged invention; *third,* that the said alleged invention was not an improvement, &c.; *fourth,* that *W. S.* was not the inventor of the alleged improvement; *fifth,* that the alleged improvement was of no use to the public; *sixth,* that the alleged invention was not new; *seventh,* that *W. S.* did not assign his patent to the plaintiff.

The following particular of objections was delivered by the defendants:—

"1. That the grantee of the said patent was not the true or first inventor of the whole or any part of the improvement or improvements described in the declaration, letters patent, specification, or either of them. 2. That the improvements, alleged to have been invented by the said *W. S.*, were not invented by him. 3. That the said improvements were not, at the time of the granting of the letters patent, nor was any part thereof, new. 4. That if any part thereof were new, the same was useless and unnecessary, and not

the ground of any patent at all, and therefore, ought not to have been described in the specification as part of the said improvements. 5. That the specification did not describe, with sufficient certainty and precision, the nature of the supposed improvements, or the manner in which they were performed; and particularly, that they were not applicable to every sort and description of the machinery to which, in the specification, they were said to be applicable. 6. That the said improvements, or some of them, had been publicly and generally used long before the granting of the said letters patent. 7. That the alleged improvements, and the means of enabling the public to avail themselves of them, were so imperfectly described in the specification or instrument in writing, in the declaration mentioned, that a machine could not be made, by the description in the specification, to produce the kind of lace therein mentioned. 8. That it was stated, in the said specification, that the said improvements were applicable to machinery for making bobbin-net lace, whereas there were several machines for making bobbin-net lace, to which there was no adaptation of the alleged improvements stated or set out in the specification, and to which those improvements could not be applied by the means and in the manner stated in the specification. 9. That the said letters patent, as appeared by the title thereof, were granted to the said *W. S.* for having invented certain improvements in machinery for the manufacture of bobbin-net lace, whereas the said specification did not shew any improvements in such machinery for the making bobbin-net lace. 10. That the machinery for making bobbin-net lace was complete in itself, and not improved by any part of the inventions for which the said letters patent were granted. 11. That such of the machinery as was set out in the said specification, as applicable to the manufacture of bobbin-net lace, was not new, but was in general use before the date of the letters patent. 12. That the invention, for which the said letters patent were granted, was more extensive than that shewn in the specification. 13. That the invention described in the said letters patent did not correspond with the invention described in the said specification. 14. That the said *W. S.* claimed as his invention those parts only of the machine which were described in the said specification by numerical figures, whereas many of the parts which were noted by letters in the said specification, must form part of his alleged invention, or the same would be incomplete. 15. That many directions were inserted in such specification which were altogether useless, and only tended to mislead. 16. That the alleged invention was not an improvement, and ought not to be the subject of a patent. 17. That should the said alleged invention, or any part thereof, be an improvement, the same was not of sufficient consequence to be the subject of a patent. 18. That a certain part or parts of the said alleged invention had been, before the date of the said letters patent, combined, and in common use, both severally and together. 19. That the description of certain parts of the said alleged improvement, as set forth in the said specification, and the description thereof, as set forth in the plans thereto annexed, were at variance with each other, and did not correspond. 20. The defendants would further shew all such objections to the said patent, and the specification mentioned in the declaration, as should be considered by the Court to be admissible under their several pleas, and whereof the pleas themselves were sufficient notice."

The plaintiff, not being satisfied with these particulars, obtained a judge's order, that the defendant should deliver intelligible and true particulars

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Wightman obtained a rule *nisi* to rescind such order; contending, that the particulars delivered were a sufficient compliance with 5 & 6 *W.* 4, c. 83, s. 5 (*a*).

Wilde, Serjt., and *Hoggins*, shewed cause.—The particulars delivered are wholly evasive; and the Court will uphold the order for the delivery of fuller particulars, *Bulnois* v. *Mackenzie* (*b*). Under several Statutes, by which notice of action is required for the protection of magistrates, commissioners, dock companies, and the like, the Courts have never thought that a notice, merely following the words of the Statute, was sufficient, but invariably look to the intention of the legislature, and require the notice to be full and explicit. So although, by the Statute of Set-off, no particular is required, the Courts have always compelled the defendant to deliver one. In the case of patents, the practice of giving a particular of objections had not grown up, but the legislature having required it, the Court will assimilate the practice in this instance to that which has obtained in other cases in which particulars are given. The present particulars contain every possible objection to the patent, without specifying any one.—[*Tindal*, C. J.—Your objection is, that they go so wide, that they have the effect of the general issue; but how can we tie them up? The defendants may, *bonâ fide*, intend to rely upon them all; and they appear sufficiently intelligible.]—The object of the Statute is, that the plaintiff should be prepared to meet the defendant on particular objections, but in these delivered in this case nothing is particularised, and their effect will only be to increase expence without end.

Wightman, in support of the rule.—It is remarkable that, down to the present Act, no attempt was ever made to force a defendant to give the particulars of his defence. In the cases of notices to magistrates, &c., the question is never brought before the Court in the first instance; but the objection is always taken at *Nisi Prius*. The patent here is taken out for a

(*a*) Enacting that, "in any action brought against any person for infringing any letters patent, the defendant, on pleading thereto, shall give to the plaintiff a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made in behalf of such defendant at such trial, unless he prove the objections stated in such notice."

The language of this section is rather remarkable, and not very intelligible. After stating that the defendant shall give a notice of *any* objections on which he means to rely, it proceeds to say, that "*no objection* shall be allowed *to be made* in behalf of such defendant at such trial, *unless he prove the objections* stated in such notice." In *Bulnois* v. *Mackenzie* (*ut infra*), the counsel on each side seem to have considered this as equivalent to an enactment that "no objection shall be allowed to be made in (on) behalf of the defendant *other than* the objections stated in such notice." But there may be a doubt whether the words will bear this interpretation. Strictly construed, the sentence would seem to import that *no* (one) *objection* is to be made by the defendant, unless he prove (all) *the objections* of which he has given notice. But the method by which he is to *prove all* his objections, without *making one*, remains open to inquiry. Should the sentence, perhaps, be read thus, "no objection to be made shall be allowed in behalf of such defendant at such trial, unless he prove the objections stated in such notice?" meaning, that the defendant shall not be allowed *the benefit* of any objection he may prove, unless he prove all of which he may have given notice; but if this be the meaning, the effect of it would not be to confine the defendant to those objections only of which he had given notice.

(*b*) 4 Bing. N. C. 127; 5 Sc. 419; 6 D. P. C. 215.

machine consisting of ninety-four parts, and the defendant means to contend that they are all useless.—[*Tindal*, C. J.—Then your particular misleads them, for it confines the objection as to uselessness to such parts as were new] (*c*).—That might easily be amended, or any other amendment might be adopted that the Court would suggest. If every objection is to be specifically stated, it would lead to endless prolixity. In *Bulnois* v. *Mackenzie*, less particular objections than these were allowed by the Court.

TINDAL, C. J.—I think this rule must be discharged. The question is, whether the particulars of the defendant's objections are so uncertain and indefinite, as to mislead the plaintiff. It was not the intention of the legislature to limit the defence, but merely to limit the expence of the trial, and to prevent the patentee from being upset at *Nisi Prius* by sudden and unexpected evidence. The notice contemplated by the fifth section must mean an honest and *bonâ fide* notice; and I see no reason to be afraid of incurring prolixity, by deciding that it is necessary to point out all the specific objections to the patent, which I think the defendant is bound to do really and substantially; the objections here that are not sufficiently specific, are those which say that certain parts are unnecessary, without stating what they are; again, the defendants say, "that the specification did not describe, with sufficient certainty and precision, the nature of the supposed improvements;" they should have stated in what respect it was not sufficient; again, it is said, "that the said improvements, *or some of them*," had been used before, without setting forth which of them. The defendant must, to use a *Scotch* phrase, *condescend* upon the particulars of his objections.

PARK, J.—I do not consider it to be the duty of the Court to point out the manner in which these particulars ought to be amended; I think it is sufficient to say that they are imperfect, and do not by any means carry out the intention of the legislature. It is a very clear case.

VAUGHAN, J.—The Act requires the defendant to give notice of his objections to the patent; and this means, that he should bring them to the plaintiff's knowledge; the defendant's object here has been to mystify, and not to explain. I never saw a case in which the maxim, *dolus versatur in generalibus*, was more applicable. Instead of limiting the expence, the effect of those particulars would be to enlarge it.

COLTMAN, J.—The Court ought to see that the objections are stated in a distinct and intelligible form; and it is better that this should be done before than at the trial. A party is not precluded from taking as many objections as he may please, but he is bound to state them with precision.

Rule discharged.

Wilde applied for the costs, but they were ordered to be costs in the cause.

(*c*) See objection 4, *ante*, p. 282.

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June 14.

In trespass, *quare clausum fregit*, a plea that the plaintiff had sustained no damage beyond that which affected his personal estate, and that after the trespasses, he took the benefit of the Insolvent Act, whereby the cause of action had vested in the provisional assignee:—*Held*, not an issuable plea.

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TRESPASS, *quare clausum fregit.* The defendant took out a summons to plead several matters; among the pleas abstracted, was one "that the plaintiff had petitioned the Insolvent Court, and that the cause of action had vested in the provisional assignee." The summons was attended by both parties, and contested, and the defendant obtained the rule upon the *terms of pleading issuably;* on the 10th of *May* he delivered his pleas; one of which was as to the breaking, entering, and making a noise, &c.; that no damage had been sustained by the plaintiff beyond that which affected his personal property, and that, after the committing of the trespasses, &c., the plaintiff, being a prisoner for debt, applied to the Insolvent Debtors' Court to be relieved, and assigned all his property, &c., to the provisional assignee, whereby the cause of action had vested in such provisional assignee. The pleas were not returned by the plaintiff, who, on the 25th of *May*, signed judgment as for want of a plea.

Addison obtained a rule *nisi* to set aside such judgment for irregularity.

W. H. Watson shewed cause.—The cause of action did not pass by the assignment to the provisional assignee, *Clark* v. *Calvert* (*a*). The plea in question, therefore, is not an issuable plea, *Tidd's Practice*, p. 471 (*b*); *Staples* v. *Holdsworth* (*c*). This is not like the case of *Hartley* v. *Hodson* (*d*), where a defendant in an action on a recognizance of bail, under a judge's order to plead issuably, pleaded, first, *nul tiel record*, and secondly, that no *ca. sa.* was sued out against the principal; and it was held that such pleas might be considered as issuable. The plea in question in this case, therefore, being not issuable, the plaintiff was at liberty to sign judgment, though the remainder of the pleas were issuable, *Waterfall* v. *Glode* (*e*). The fact of the defendant having obtained a rule to plead several matters makes no difference.—[*Park*, J.—The *R. T.*, 1 *W.* 4, s. 13, requires that the summons for leave to plead several matters should be "accompanied by a short abstract or statement of the intended pleas." The course of practice at chambers is, that the judge puts his initials to the abstract. Ought not the application, in this case to have been, to set aside the judge's order, *quia improvide emanavit?*]—The plea delivered does not, in fact, support the abstract.

Addison, in support of the rule.—The plea delivered is, in substance, the same as the abstract; all the insolvent's property vested in the assignee by the assignment, and with it the right of action in this case, which affected his property. In *Smith* v. *Coffin* (*f*), it was held, under the Bankrupt Act, 13 *El.* c. 7 (*g*), (the language of which was similar with that of the present In-

(*a*) 3 Moo. 96; 8 Taunt. 742.
(*b*) 9th ed.
(*c*) 4 N. C. 144; 5 Scott, 432; 6 D. P. C. 196.
(*d*) 1 Moo. 430.
(*e*) 3 T R. 305.
(*f*) 2 H. Bl. 444.
(*g*) See sec. 11.

solvent Act) (*h*), that the right to bring a *real* action passed to the assignees of a bankrupt. The rule to plead several matters is not now granted as a matter of course, as it was formerly, at least in the *King's Bench* (*i*). The plaintiff here attended before the judge, and had an opportunity of objecting to the proferred plea; if he did so, and the judge permitted the plea, the plaintiff cannot now treat it as a nullity: if he did not object to it then, he has no right to do so afterwards; at any rate, the plaintiff, after receiving the plea, and keeping it for fifteen days without making any objection, had no right to sign judgment, *Horsley* v. *Purdon* (*j*).

TINDAL, C. J., said the Court would consult the other judges upon the matter. And now his Lordship briefly intimated that, under the circumstances of the case, they were of opinion that the plea in question was not issuable.

Rule discharged.

(*h*) 7 G. 4, c. 57. See sec. 11. (*j*) 2 D. P. C. 228.
(*i*) See Tidd's Prac. 705, 6th ed.

BARCLAY and others *v.* COLLETT.

June 1.

TROVER, to recover certain title deeds and writings.

The defendant pleaded, *first*, Not Guilty; *secondly*, that the plaintiffs were not possessed of the said deeds, &c., as of their own property; and *thirdly*, that the said deeds, &c., were the property of the plaintiffs and defendant, as tenants in common. On each plea issue was joined.

The cause was heard before *Tindal*, C. J., at the Spring Assizes, 1837, for *Surrey*, when a verdict was found for the plaintiffs, damages, 5000*l.*, to be reduced to 1*s.* upon the deeds, &c., being delivered to the plaintiffs by the defendant, should the Court be of opinion that the plaintiffs were entitled to judgment on the following case:

E. J. Collett, in 1806, and many years previously, carried on the business of a hop merchant, in *Southwark*. In that year he became seized in fee, by purchase of the messuage and premises to which the deeds mentioned in the declaration relate. The premises were used by *E. J. C.* for carrying on his business of a hop merchant from that time till the year 1821, when he retired from trade, and was succeeded by the defendant, his eldest son and

Where a testator distinctly devises the whole of his residuary property, real and personal, to trustees, although the trusts may be difficult and complicated, yet, if they are not absolutely uncertain, the Court will give effect to the devise.

A will, duly executed to pass realty, contained several specific devises and bequests, which were set out at length in eight schedules; by the second of which certain property was devised in trust for the defendant, who was the testator's heir at law; the will proceeded as follows:—"All the rest, residue, and remainder of my *real* and personal *estate* and effects, whatsoever and wheresoever, I give, *devise*, and bequeath unto my said trustees, *their heirs*, executors, &c., in trust, to divide the same equally among my children, &c., upon the same trusts, and subject to the same contingencies and bequests over as their respective original legacies are subject and liable to, &c." There was no power to sell or lease in the clause. At the foot of the will, the testator subsequently added the following memorandum: "Having omitted to include my freehold house and premises in, &c., in the second schedule of my above will, as intended, I declare my will and desire to be, that the same shall be considered as included to pass to my said son *J. C.* (the defendant), who, being my heir at law, will be entitled to the same by descent from me at my decease." This memorandum was signed by the testator, but attested by one witness only:—*Held*, that, as the above memorandum must necessarily be laid out of consideration, the house and premises in question passed by the residuary clause to the trustees, notwithstanding that the trusts were so complicated, as probably to compel the parties to have recourse to equity, in order to perform them.

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heir at law, who became tenant from year to year to the said *E. J. C.*, of the said premises, at 100*l. per annum*, but ceased to pay rent from the month of *March*, 1828, by the direction of *E. J. C.* On the 11th of *October*, 1827, whilst the defendant was paying rent to *E. J. C.*, the said *E. J. C.* made his will, and appointed *John Tritton* (who died in testator's lifetime), and the plaintiffs, *A. R. Barclay*, *T. M. Alsager*, and *H. Lloyd*, trustees and executors of his will. The will was very long, and contained various bequests and devises to the trustees, in trust for the testator's children and others, which were specially set forth in eight schedules annexed to the will. Those parts of the will material to this case were as follows:

The testator gave and bequeathed the freehold, leasehold, and copyhold hereditaments, and the three *per cent.* reduced annuities specified in the second schedule, thereunder written, unto and to the use of his son, *John Collett*, (the defendant,) his heirs, executors, administrators, and assigns, absolutely for ever, according to the nature and quality thereof. The said three *per cent.* reduced annuities to be transferred to him within six months next after the testator's decease, with all dividends then due in respect of the same.

He gave and devised the freehold and copyhold hereditaments specified in the third schedule thereunder written, unto and to the use of his son *Thomas Collett*, his heirs and assigns for ever.

He also gave and bequeathed the three *per cent.* reduced annuities mentioned in the third schedule thereunder written, unto the said trustees, their executors, administrators, and assigns, upon trust, to pay and assign the same unto his son *J. C.*, his executors, &c., upon his attaining the age of twenty-five years. But in case the said *J. C.* should depart this life before twenty-five years, leaving issue living at his death, then, upon trust, to pay, assign, and divide the last-mentioned three *per cent.* annuities unto and amongst all and every the child and children of his said son *J. C.*, in equal shares, if more than one; and in case his said son, *J. C.*, should depart this life under twenty-five, without leaving issue living at his death, then, in trust, to pay, assign, and divide the last mentioned annuities amongst his brothers and sisters, in equal shares and proportions, in such way and manner, and subject to such trusts as the testator had by his will given and bequeathed their respective legacies in the said three *per cent.* reduced annuities.

After various other bequests and devises, the will proceeded thus:—"*All the rest, residue, and remainder of my real and personal estate and effects* whatsoever and wheresoever, I give, devise, and bequeath *unto my said trustees*, their heirs, executors, &c., *in trust, to divide the same equally among my children*, when my youngest child shall attain the age of twenty-five years, and so and in such manner that the shares of each of my children of and in the said residue may be held and enjoyed *upon the same trusts, and be subject to the same contingencies and bequests over as their respective original legacies are subject and liable to*, under and by virtue of this my will: provided, that if any of my said children should die before my youngest child attains the age of twenty-five years, without leaving any lawful issue at his or their death; or, leaving such, all such issue shall be extinct at the time my said youngest child shall attain the age of twenty-five years, then, I will and declare that the share or shares of my said child or children so dying, of and

in the residue of my said real and personal estate and effects, shall accrue to and be divided amongst such of my children as shall be living at the time of my youngest child attaining the age of twenty-five years; or shall have departed this life before that time, leaving lawful issue then living; such accruing shares to be held and enjoyed upon the same trusts, ends, intents and purposes as hereinbefore declared of and concerning the original shares of my said children, of and in the said residue." Then followed a proviso for appointment of new trustees, their reimbursements, and a revocation of former wills.

The second schedule contained a description of the property devised to the defendant, not including the premises in question. The testator had affixed his signature at the conclusion of each of the schedules, and the will was duly attested by three witnesses.

Upon the last sheet was the following memorandum:

"13th *February*, 1838.

"Memorandum: Having omitted to include my freehold house and premises in the borough of *Southwark*, in the second schedule of my above will, as intended, I declare my will and desire to be, that the same shall be considered as included, and pass to my said son, *John Collett*, who, being my heir at law, will be entitled to the same by descent from me at my decease.

(Signed), *E. J. Collett.*

Witness to the signing, *T. C.*"

The testator died on 31st *October*, 1833.

The youngest child of the testator attained the age of twenty-five in *July*, 1837.

The will was not altered nor revoked, unless by the memorandum or intended codicil hereinbefore set forth, and was, on the 20th of *November*, 1833, proved by the plaintiffs in the Prerogative Court of *Canterbury*.

The personal estate was sufficient to pay all debts and the specific legacies.

The testator had no freehold property which was not specifically, and in terms, described in, and devised by, the schedules to his will, or some of them (except the premises in question.)

The question for the opinion of the Court was, whether the plaintiffs had shewn a sufficient property in the deeds to entitle them to recover in this action against the defendant:

If the Court should be of opinion that the plaintiffs had shewn a sufficient property in the deeds, then the verdict already entered was to stand.

If the Court should be of a contrary opinion, then the verdict was to be entered for the defendant.

Petersdorff, (with whom was *Wilde*, Serjt.), for the plaintiffs.—As the memorandum or codicil, not having been duly signed to pass realty, must be laid out of the question; the messuage therein referred to would pass absolutely and unconditionally to the plaintiffs in trust, under the residuary clause of the will; *Doe*, dem. *Gallini* v. *Gallini* (*a*); and consequently, they would have a right to the title deeds. The cases in which any ambiguity has arisen on this subject may be divided into three classes: *first*,

(*a*) 2 N. & M. 619; 4 N. & M. 894; S. C. 5 B. & Ad. 621; 3 A. & E. 341.

where no reference is made in the will to real estate, either in express terms, or by reasonable intent or inference, in which cases it has been held that real estate did *not* pass, *Roe*, d. *Helling* v. *Yeud* (*b*); *Doe*, d. *Hick* v. *Dring* (*c*); *Doe*, d. *Bunny* v. *Rout* (*d*): *secondly*, where reference *is* made, by inference, to real estate, it has been held to pass, *Doe*, d. *Wall* v. *Langlands* (*e*); *Doe*, d. *Andrew* v. *Lainchbury* (*f*); *Hardacre* v. *Nash* (*g*): *thirdly*, where real estate passes from the use of terms applicable to realty, in describing the devisee, or the object of the devisor's bounty, *Bebb* v *Penoyre* (*h*); *Doe*, d. *Hurrell* v. *Hurrell* (*i*); *Doe*, d. *Spearing* v. *Buckner* (*j*); *Camfield* v. *Gilbert* (*k*). In the present case, however, such questions cannot arise, for the phraseology employed by the testator, in the residuary clause, is of the most technical and scientific description, so as to leave no doubt as to its operation.

Channell (with whom was *Scriven*, Serjt.), for the defendant.—Admitting that the codicil is inoperative, still the property in question would pass to the defendant, as heir at law to the testator; for, *first*, it could not be gathered from the will itself that it was the testator's intention to devise such property to the trustees, and in construing a will, the Court would take surrounding circumstances into their consideration, so as to put themselves in the place of the testator, and then see how the terms of the will would affect the property, as was laid down by *Parke*, J., in *Doe*, d. *Templeman* v. *Martin* (*l*): *secondly*, there was no power given to the trustees by the residuary clause (under which they claimed), to sell or let real estates, but merely a trust to divide the property among certain parties; and it was obvious, from the whole nature of the trusts, that the residuary clause was applicable only to personalty; the ulterior dispositions of the property were altogether uncertain, and therefore the devise was bad for uncertainty, *Leslie* v. *The Duke of Devonshire* (*m*); *Jones* v. *Hancock* (*n*). The plaintiffs might be considered as trustees for the heir, *The Attorney General* v. *Bowyer* (*o*); and *Hopkins* v. *Hopkins* (*p*).

Petersdorff, in reply, referred to *Dally* v. *King* (*q*) and *Doe*, d. *Burkitt* v. *Chapman* (*r*).

TINDAL, C. J.—It appears to me to be the proper construction of this will, that the trustees should take the legal interest in the house in question; and therefore, that they have a right to the title-deeds thereof, in respect of which the present action is brought. In coming to a conclusion upon this subject, we must leave out of the will the codicil which is annexed to it; as in consequence of the non-compliance with the requisitions of the Statute of Frauds, that codicil cannot be looked at by the Court in a judicial point of view; and

(*b*) 2 N. R. 214.
(*c*) 2 M. & S. 448.
(*d*) 7 Taunt. 79; 2 Marsh, 397.
(*e*) 14 Ea. 370.
(*f*) 11 Ea. 290.
(*g*) 5 T. R. 716.
(*h*) 11 Ea. 160.
(*i*) 5 B. & A. 18.
(*j*) 6 T. R. 610.
(*k*) 3 Ea. 515.
(*l*) 4 B. & Ad. 771, 785; 1 N. & M. 512, 524.
(*m*) 2 Bro. C. C. 187.
(*n*) 4 Dow. Parl. Ca. 145.
(*o*) 3 Ves. 714.
(*p*) 1 Atk. 581; 1 Ves. sen. 269.
(*q*) 1 H. Bl. 1.
(*r*) *Ib.* 223.

we are bound to look at the will through those *media* only which the law affords, however we may regret our inability to carry into effect what we cannot help seeing was the testator's wish. The codicil, therefore, being laid out of our consideration, and the property in question not being specifically devised by the will, we must look to the residuary clause, to see what may be its legal operation, with respect to the house in question. (His Lordship then read the residuary clause, as stated in the case.) Now it is contended, on behalf of the defendant, that the trusts contained in this clause, if applied to a real estate, are so complicated or uncertain, as either to render the devise wholly void by reason of that uncertainty, or, at any rate, that the Court cannot fail to see that it was not the intention of the testator that any real property should pass under that clause: but I cannot myself arrive at such a conclusion. There is no doubt but that the trustees will find considerable difficulty and embarrassment in carrying the trusts into execution; but I cannot say that there is such uncertainty in the residuary devise to them as to render it a complete blank. The argument on the part of the defendant, has certainly raised great difficulty in the way of the trustees, but they will probably borrow the aid of equity to enable them to execute the trusts in question; it is not necessary for us to give any opinion as to the way in which the property is to be divided, or how the trusts are to be executed. My opinion is founded upon these grounds; here is a clear, definite, distinct devise to the plaintiffs, as trustees, of the residue of the testator's estate, real and personal; the trusts upon which they take the property are difficult and complicated, but not uncertain, and consequently, the devise is operative, and the estate in question will pass to them; and, as a corollary to this conclusion, they are entitled to the deeds which relate to that estate.

PARK, J.—I quite agree with what has been said by my Lord, that the difficulty of carrying the trusts of this will into execution is no answer to the claim by the trustees to the property in question, as part of the testator's residuary estate, the whole of which is clearly devised to them. This Court is not called upon to decide how the trusts must be performed. As to the codicil, we cannot give any weight to it; it is, for all judicial purposes, a blank. The case has been argued very fairly and satisfactorily by Mr. *Channell*, on behalf of the defendant; but I am, nevertheless, of opinion, that the trustees are entitled, at law, to the whole legal estate in the residue of the testator's property, and consequently the judgment must be for them.

VAUGHAN, J.—I am of the same opinion. The Court are not at liberty to speculate on the intention of the testator, when the terms of a devise are clear and unambiguous, as they are in this case. The testamentary paper annexed to the will can neither be regarded as a revocation of that will, nor as a substantive devise. We must, therefore, lay it wholly out of our consideration. Then, looking at the will, the devise of the residue of the testator's property is perfectly clear. There can be no doubt that, at the time the will was made, the house in question had escaped the testator's attention; but it is quite as clear that he did not mean to die intestate as to any portion of his property. The plaintiffs, therefore, under the general terms of the residuary clause, are entitled to the legal estate in the house, and consequently,

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to the deeds relating to it. The difficulty as to the ultimate disposition of the property can make no difference.

COLTMAN, J.—It is certainly true, or at least highly probable, that the testator had not the house in question in his mind at the time the will was executed; but that is no reason why it should not pass under a residuary devise. A residuary clause in a will is often intended to pass property which is not exactly in the mind of the testator at the moment it is penned; it is meant as a sweeping disposition of all such property as the testator may have previously left undisposed of. In the present case it may be difficult to say how the trusts are ultimately to be performed; but we cannot, upon that account, say that the devise is to be wholly unavailable. It is not necessary to give any opinion upon that point, but we may suppose that the trusts may be void in part, yet they may be sensible as to other parts. Nor can I see that the trustees can be considered as holding the property in trust for the heir, as the trust is not executed. I am of opinion, therefore, that the legal estate in the house in question, passes to the trustees under the residuary clause, and consequently, that the defendant cannot hold the deeds against them.

Judgment for the plaintiffs.

June 4.

GOULD *v.* OLIVER.

The parties to a cause agreed that the matter in dispute should be limited to one particular question; the defendant, contrary to good faith, pleaded a set-off, and delivered particulars, embracing another subject of dispute between the parties: the Court, upon the plaintiff's paying the amount claimed in such particulars, set them aside.

CASE. The *first count* was on a charter party, to convey timber from *London* to *Quebec*. *Breaches; first*, for taking a greater cargo than the vessel could carry; *second*, that the cargo was badly loaded, whereby the plaintiff was prevented from insuring; *third*, that the defendant did not take proper care, and that, by his neglect, part of the cargo belonging to the plaintiff was thrown overboard. The *second count* alleged a custom for owners of vessels to load a reasonable part of the timber on the deck; that the plaintiff's timber was so loaded, and was necessarily thrown overboard, and that the defendant was liable to pay general average. The *third count* was on an account stated.

The defendant pleaded the general issue to the whole declaration. To the *first* and *second breaches* in the *first count* respectively, *first*, a traverse, and *secondly*, that the cargo was loaded by the plaintiff's direction; to the *third breach*, *first*, a traverse; *secondly*, that the timber was necessarily thrown overboard, *absque hoc*, that it was thrown over by the defendant's neglect. To the *second count*, *first*, a traverse of the custom; *secondly*, admitting the custom, but denying the defendant's liability to contribute. And to the *first* and *third counts*, a set-off for general average.

The plea, denying the defendant's liability to contribute, was demurred to, and the trial of the issues, in fact, stood over till the demurrer should be decided, and an order for the delivery of particulars of the defendant's set-off, obtained in *June*, 1836, was suspended for the same reason.

Judgment was given for the plaintiff on the demurrer, in last *Michaelmas Term* (*a*).

On the 16th of *January*, 1838, the defendant delivered particulars of set-off for 22*l.* 19*s.* 9*d.* for *general average*, including the damage done to the vessel, and also in respect of some other goods which had been thrown overboard. The plaintiff's attorney omitted to examine these particulars, and on the 24th of *January* a rule was obtained for a special jury; on the 10th of *February*, however, the particulars were returned by the plaintiff's attorney. The cause was set down for trial at the Sittings after last *Hilary Term*, but was made a *remanet* by the defendant.

Wilde, Serjt., in last *Easter Term*, upon an affidavit stating the above facts, and that the plaintiff and defendant had come to an express understanding that the only question to be tried in the cause, was as to the custom of loading timber as a deck cargo; and also, that the plaintiff did not dispute his liability to general average, and was willing to pay the same, obtained a rule calling upon the defendant to shew cause why, upon the payment of the sum of 22*l.* 19*s.* 9*d.* (the amount claimed by the defendant for general average), the particulars of the defendant's set-off should not be set aside and vacated, and why the costs of the day, occasioned by the cause being made a *remanet*, together with the costs of the present application, should not be costs in the cause.

Atcherley, Serjt., and *R. V. Richards*, shewed cause, and urged that the Court would not interfere to deprive the defendant of the benefit of his set-off.

Wilde, Serjt.—A claim for general average is not, upon principle, a subject of set-off, as it is an unliquidated claim, *Grant* v. *The Royal Exchange Assurance Company* (*b*); *Morley* v. *Inglis* (*c*). The plaintiff did not demur, as he did not deny his liability to pay the general average; but his object was, that the real matter in dispute between the parties should be tried, according to the understanding between the parties. The delivery of these particulars had been made with a view to snap a verdict, and was in breach of good faith.

TINDAL, C. J.—This rule may be divided into two parts; as to the first, it is clear that the plaintiff can have no legal right to vary the relation between himself and the defendant, after a set-off has been pleaded; cases, however, may readily be imagined, where the parties have come to a mutual agreement as to the points in dispute between them, which shall form the subject matter of the action, in which it would be highly unjust to allow either of them, contrary to such agreement, to introduce other matters into the action. Now, looking at the affidavits in the present case (although there is some discrepancy between them), it clearly appears that there was such an agreement between these parties; and the rule, therefore, as to this part of it, ought, I think, to be made absolute. As to the second part of it, relating to costs, as

(*a*) See 4 Bing. N. C. 134; 5 Scott, 445.
(*b*) 5 M. & S. 439.
(*c*) 4 N. C. 58; 5 Scott, 314; 6 D. P. C. 202.

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it appears that the plaintiff has put the defendant into a worse situation by the steps he has taken, the rule must, as to that part, be discharged, the costs of the present application being costs in the cause.

The other judges concurring,

Rule absolute, as to the first part; discharged, as to the second part.

June 6 & 8.

LINE *v.* STEVENSON and another.

A., by indenture, "*demised*" certain premises to *B.*, and covenanted for *B.'s* quiet enjoyment against himself and all claiming under him: —*Held*, that the *implied* covenant of title raised by the word "demise," was estrained by he subsequent express covenant for quiet enjoyment, and that the plaintiff could not sue upon the former.

COVENANT against the executors of *T. Gutterson.*

The declaration stated, that whereas on the 27th of *October*, 1836, by a certain indenture then made by and between the said *T. Gutterson*, of the one part, and the plaintiff, of the other part, (*profert*) the said *T. Gutterson*, for the consideration therein mentioned, did *demise*, unto the said plaintiff, all those two messuages, &c., then in the tenure or occupation of the plaintiff, &c., to hold the same unto the said plaintiff, his executors, &c., from the 25th day of *December* then next ensuing, for the term of forty-nine years, wanting ten days, at the yearly rent of 80*l.*, &c.; and the plaintiff did, by the said indenture, covenant, promise, and agree, for himself, his executors, &c., to and with the said *T. Gutterson*, his executors, &c., in manner following; that is to say, that he, the said plaintiff, his executors, &c., should and would, at his and their own proper cost and charges, within the space of one year from the commencement of the said term, take down and rebuild the party-wall between the said two messuages, and also take down the fronts of the said two messuages, and rebuild and carry up new ones, &c., supported by substantial, strong posts, &c. Then followed general covenants, in the usual form, by the plaintiff, to put the premises into good and substantial repair, to the satisfaction of the surveyor of the said *T. Gutterson*, his executors, &c., and by *T. Gutterson*, *for quiet enjoyment* against him, and those claiming under him; the plaintiff, his executors, &c., paying the said rent, and performing the covenant on his part. By virtue of which said indenture, the plaintiff afterwards, to wit, on the said 25th of *December*, 1836, entered into and upon the said several premises, &c., and became and was possessed thereof. (Averment of general performance by the plaintiff.) And although the plaintiff did, within the space of one year from the said 25th day of *December*, 1836, aforesaid, pay, lay out, and expend a large sum of money, to wit, the sum of 2,000*l.* in and about the taking down and rebuilding the party-wall between the said two messuages, and in taking down the fronts of the said two messuages, &c., and in rebuilding and carrying up new ones, &c., supported by substantial, strong posts, &c., and in putting the said premises, &c., into good and substantial repair and condition, according to the tenor and effect of the said indenture; and although the said *T. Gutterson* did not die until after the said 25th of *December*, 1836, that is to say, although he, the said *T. Gutterson*, did not die until the 10th day of *January*, 1837, yet the plaintiff, in fact, saith, that the said *T. Gutterson had not*, at

the time of the sealing and delivery of the said indenture, or at any other time during his life time, nor had they, the said defendants, at any time before the commencement of this suit, *power and authority* to *demise* the said messuages to the said plaintiff, for the term of forty-nine years, wanting ten days, as in the said indenture is mentioned; by means of which said several premises, the plaintiff hath lost and been deprived of the said several sums of money so paid, laid out, and expended by him, the plaintiff, in and about the pulling down, altering, &c., and repairing the said several messuages or tenements so alleged to be demised to the plaintiff as aforesaid; so the said plaintiff, in fact, saith, that the said *T. Gutterson*, in his life time, although often requested so to do, did not keep, nor have the said defendants, as such executors as aforesaid, since the death of the said *T. Gutterson*, kept the said covenants so made by the said *T. Gutterson*, for himself, his executors, &c., with the plaintiff in manner and form as aforesaid; but have, and each of them hath hitherto wholly neglected and refused, and the said defendants still neglect and refuse so to do, to the damage, &c.

Special demurrer, that the mere want of power to grant the lease for the full term of forty-nine years wanting ten days, does not appear on the face of the declaration to be a breach of the express covenant declared upon; that the subsequent allegations as to the loss of the money expended, and as to the not keeping and breaking the covenant, are too general; and that the supposed breach or breaches, or what is alleged as such, is merely a state of facts, which, though consistent with the supposition of there having been a breach, may yet have arisen without any breach at all; and that no sufficient breach is alleged. *Joinder.*

The marginal note was as follows: the point to be argued on the part of the defendant is, that the general covenant implied by the word "demise" is restricted by the express covenant, and that the mere want of power to grant the lease is not a breach of the express covenant.

The points to be argued on the part of the plaintiff are, that, under the circumstances detailed in the declaration, the covenant implied by the word "demise," is not restricted by the express covenant, and that the want of power to grant a lease, admitted in these pleadings, is a breach of the covenants set out in the declaration.

Channell, for the demurrer.—It is admitted that the word "demise," creates an implied covenant that the lessor has a general title; but as the lease contains an express covenant for quiet enjoyment, the plaintiff cannot recover for the breach of such implied covenant. This point was expressly decided in *Nokes's Case* (*a*), and *Merrill* v. *Frame* (*b*). He also referred to 2 *Wms. Saund.* (*c*).

Bere and *Ogle*, in support of the declaration.—There are two covenants to be *implied* from the word "demise," one being, that the lessor has title, and the other for quiet enjoyment: and as these *implied* covenants are quite distinct and separate, the former of them is not restricted by the subsequent *express* covenant for quiet enjoyment. If there were no such *express* covenant,

(*a*) 4 Rep. 80.
(*b*) 4 Taunt. 329.
(*c*) 178 a. n. (*a*).

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the lessee might proceed for the breach of either of the *implied* covenants; he might bring an action on the *implied* covenant of title, and recover nominal damages; and if he were afterwards evicted, he might maintain a second action on the *implied* covenant for quiet enjoyment. In the one case, the Statute of Limitations would run from the execution of the indenture; in the other, from the act of eviction. *Holder* v. *Taylor* (*d*); *Fraser* v. *Skey* (*e*); *Gainsford* v. *Griffith* (*f*); *Howell* v. *Richards* (*g*); *Hesse* v. *Stevenson* (*h*); *Barton* v. *Fitzgerald* (*i*); *The Duke of St. Albans* v. *Shore* (*j*); and *Phillips* v. *Fielding* (*k*), are authorities for the plaintiff. In *Burnett* v. *Lynch* (*l*), *Littledale*, J., said, "An action of covenant will lie by the lessee against the lessor upon the word '*demise*,' in the lease; but that word expresses a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term, and therefore, if the lessee be ousted during the term, an action of covenant will lie by him against the lessor." So in *Foster* v. *Norman* (*m*), *Hale*, C. J., said, "If I covenant that I have lawful right to grant, and that you shall enjoy, notwithstanding any claiming under me, there are two several covenants, and the first is general, and is not qualified by the second."—[*Tindal*, C. J.—Lord *Hale* appears to be speaking of *express* covenants.]—It was competent to the plaintiff to set out the *implied* covenant according to its legal effect, and to treat it as an *express* covenant; *Saltoun* v. *Houstoun* (*n*). The case of *Milner* v. *Horton* (*o*), seems in favour of the defendants, where it was held that covenants in an indenture of sale, that the covenantors were seized of a good estate in fee-simple, and had good right, &c., to convey, were qualified and restricted by a subsequent covenant for quiet enjoyment; but that case was overruled by *Smith* v. *Compton* (*p*). *Nokes's Case*, which was relied upon by the other side, is not applicable; that was an action upon the implied covenant for quiet enjoyment, and it was held that such covenant was restrained by the subsequent covenant to that effect; and from the report of the same case in *Croke* (*q*), it appears that this was only the opinion of C. J. *Popham*.

TINDAL, C. J.—I am of opinion that the judgment must be for the defendant on the authority of *Nokes's Case*, as reported by Lord *Coke*, which we must take to be a more correct report of the case than the one in *Croke* (*r*). In that case, the defendant had demised to the plaintiff a house

(*d*) Hob. 12.
(*e*) 2 Chit. Rep. 646
(*f*) 1 Saund. 51, 58, g.
(*g*) 11 Ea. 633.
(*h*) 3 B. & P. 565.
(*i*) 15 Ea. 530.
(*j*) 1 H. Bl. 268.
(*k*) 2 H. Bl. 123.
(*l*) 5 B. & C. 589; 8 D. & R. 368.
(*m*) 1 Mod. 101.
(*n*) 1 Bing. 433; 8 Moo. 546.
(*o*) M'Clel. 647.
(*p*) 3 B. & Ad. 189.
(*q*) Nom. *Nokes* v. *James*, Cro. El. 674.
(*r*) *Croke's Reports* were originally published in the inverted order of the reigns of *Elizabeth*, *James* and *Charles*, so that *Cro. Car.* was cited as 1 *Cro.*, and *Cro. Eliz.*, as 3 *Cro.* In *Mollam* v. *Horne* (2 Keble, 316), upon 3 Cro. 843, being cited, the Court paid no regard to it; and *Keeling*, J., said, "it were better it had never been printed;" Mr. *Bridgman* supposes that this referred to a very incorrect edition, bearing date M,DC,L. However, in Lord *Thanet's* trial, Lord *Kenyon* is reported to have said, "The cases in *Cro. Eliz.* are said not to be of such great authority as those in the latter part of *Croke's* lifetime. I remember to have heard Mr. Justice *Foster* say so." (27 *Sta. Tri.* 953.)

by the words "*demise*, grant, &c.," and the lessor covenanted that the lessee should have quiet enjoyment; the assignee of the lessee having been evicted by a stranger, the lessee sued the lessor in debt upon a bond given by the latter to perform all covenants in the lease; the fourth point resolved in the case, as reported by *Coke*, is this: "It was held by *Popham*, Chief Justice, and *totam curiam*, that the said express covenant qualified the generality of the covenant in law, and restrained it, by the mutual consent of both parties, that it should not extend further than the express covenant, *quia clausa generalis non refertur ad expressa*, in this case. And so was it now lately adjudged in *Hammond's Case*, in this Court." The same point is thus mentioned in *Croke*: "*Foster*, not being a counsel in the case, put the justices in mind of one *Hammond's Case* in this Court, to be ruled that an express covenant shall take away the covenant in law; *and to this opinion* Popham *inclined, but the other judges did not deliver any opinion therein*." Lord *Coke* puts it affirmatively, as having been so resolved by *the whole Court*; and the doctrine, as laid down by him, has been considered law from that time (*s*). An ingenious argument has been raised, that the word "demise," contains two implied covenants, which are distinct and separate; the first, that the lessor had power to make the lease; and the second, that the lessee should have quiet enjoyment of the premises; and I am not prepared to say that this may not be so; but I cannot agree with the conclusion which has been drawn from this argument, namely, that both these implied covenants are not restrained by the express covenant for quiet enjoyment. Most of the authorities that were cited by the plaintiff, appear to be cases of two *express* covenants; and there is no doubt that two such covenants may be so worded, as that one should be separate and distinct from the other. But here there is no express covenant for title; there is only the implied covenant arising from the word "demise;" and I think that the subsequent *express* covenant shews that the word "demise" was not intended to *imply* a covenant for title. *Holder* v. *Taylor* was an action of *covenant* by a lessee against a lessor, who had *demised* the premises; whereas at the time of the lease made, the lessor was not seised of the land, but a stranger: and it was objected, that no action would lie, because the plaintiff did not shew his own entry and eviction by the stranger: "but," says the reporter, "the whole Court was of opinion that an action did lie; for the breach of covenant was, in that the lessor had taken upon him to demise that which he could not; for the word *demisi* imports a power of letting, as *dedi* a power of giving; and it is not reasonable to enforce the lessee to enter upon the land, and so to commit a trespass. *But*," he adds, "*if it were an express covenant for quiet enjoying, there, perhaps it were otherwise.*" So that this appears rather to be against the plaintiff than in his favour. So in *Fraser* v. *Skey*, there does not appear to have been any restrictive covenant. These cases, therefore, do not shew that, where there is such a covenant, an action will lie upon the implied covenant in law, and the plaintiff's counsel have failed in producing

(*s*) The authority of the case upon this point, as reported in *Coke*, was doubted by *Fleming*, C. J., in *Proctor* v. *Johnson* (2 Brownl. 214), but it has been since recognized, and considered as established in several cases. See *Gainsford* v. *Griffith* (*ut supra*); *Hayes* v. *Brickerstaff* (Vaugh. 126); *Brown* v. *Brown* (1 Lev. 57); *Frontin* v. *Small* (2 Ld. Raym. 1419.)

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any substantive authority in support of such a proposition; and certainly the general understanding in the profession has always been with the resolution in *Nokes's Case*, as reported in *Coke*. I am of opinion, therefore, that we must give judgment for the defendant.

PARK, J.—I quite agree. Notwithstanding the great research which has been shewn by the learned counsel for the plaintiff, I am clearly of opinion that the rule of law, since the time of Lord *Coke*, has always been held to be such as it is laid down by that learned person in his report of *Nokes's Case*. It may be remembered, that at that time *Coke* was Attorney General, while *Croke* must have been young at the bar, as he did not become a judge till about twenty-five years afterwards. Lord *Hale's* opinion in *Norman* v. *Foster*, does not, I think, make any difference, for he certainly appears, as my Lord has observed, to be speaking of two *express* covenants.

VAUGHAN, J.—I am of the same opinion. It would be impossible to give judgment for the plaintiff in this case, without violating the rule as laid down in *Coke's* report of *Nokes's Case*. There is an observation, too, at the close of that case, which would appear to corroborate the authenticity of that report, where Lord *Coke* says, "and there is great reason in the principal case, that the particular covenant subsequent should qualify the general force of this word *demisi*, for otherwise the particular covenant would be in vain, if the force of this word *demisi* should stand." I confess, it appears to me that there is a fallacy in supposing in the present case that there are two distinct covenants implied by the word "demise;" it might have been so, perhaps, if there had been no express covenant, but as there is one here, I think that whatever covenants may be implied from the word demise, they are restrained by the subsequent express covenant. This point was also under discussion in *Merrill* v. *Frame*, where, in a similar case to the present, Serjeant *Shepherd* argued, that an express covenant for quiet enjoyment did not restrain or destroy the implied covenant for an absolute good title, which was contained in the words "demised and leased;" and he cited *Gainsford* v. *Griffith* to shew that there might be a distinct general covenant, not restrained by the particular covenant. The *Court*, however, expressed a decided opinion against the possibility of applying that doctrine to the present case. The rule of law was, that *expressum facit tacitum cessare;* but the argument of the plaintiff would make *expressum* and *tacitum* to mean the same thing. Upon the authority of these cases, therefore, I am of opinion that the implied covenant in this case, is restrained by the express covenant, and the judgment must be for the defendant.

COLTMAN, J.—It appears to me, that there is a vast difference between a case where there are two express covenants, and one in which one of the covenants only is express, and the other implied by law. All the cases which have been relied upon by the plaintiff, from *Gainsford* v. *Griffith*, to *Smith* v. *Compton*, seem to be cases of *express* covenants, and so, I think, was *Norman* v. *Foster;* and in that view I entirely agree with the doctrine, as there laid down by Lord *Hale*. In this case it has been argued, for the plaintiff, that an implied covenant may be pleaded as an express covenant

but if the defendant were to plead *non est factum*, and our present decision is right, the plaintiff, upon that issue, would fail in his evidence. We are bound, I think, by Lord Coke's opinion. The word "demise," in its natural sense, would not import any covenant; but its meaning has been extended, by operation of law, to imply a covenant, that the party demising had a legal right so to do; this *implied* covenant, however, is liable to explanation, and may be restrained by a subsequent express covenant. This rule has never been judicially questioned, and it would be very dangerous to unsettle it by introducing a novel distinction. The present case is not distinguishable from *Merrill* v. *Frame:* as I understand it, there was, in that case, as in the present, an express covenant in the ordinary form for quiet enjoyment; the plaintiff, however, sued upon the implied covenant raised by the word "demise;" the Court, however, upon *demurrer*, held, that such implied covenant was restrained by the subsequent express covenant, and gave judgment for the defendant.

Judgment for the defendant.

SIMPSON *v.* SIR W. R. CLAYTON.

June 14.

COVENANT against the defendant, as administrator of Sir *W. Clayton*, deceased, *cum testamento annexo;* for that whereas Sir *W. C.*, (being possessed of the premises hereinafter mentioned to have been demised for the residue of a term of ninety-nine years, commencing from the 5th of *March*, 1777, theretofore granted of the said premises (*inter alia*), under and by virtue of certain letters patent, under the great seal of the duchy of *Cornwall* (*a*), if three persons, *viz.*, the said Sir *W. C.; Geo. Clayton*, and *James Medwin*, the lives nominated in the said letters patent, should so long live;) by indenture of the 1st of *August*, 1789, demised part of the said premises to *Iemay* and *Harrison*, for sixty-five years and one quarter, if Sir *W. C.*, *G. C.*, and *J. M.*, should so long live, at a rent of 80*l.* for the first year, rising to 350*l.* for the seventh and succeeding years; and Sir *W. C.* covenanted that he, his executors, and all other persons who for the time being

From 1671 to 1765, the duchy of *Cornwall* had granted successive leases of large estates to the family of *W. C.*, upon the payment of certain fines. In 1777 a new term was granted by letters patent to him for ninety-nine years, if three specified lives should so long live. In 1789,

W. C. demised part of the premises to *I.* and *H.* for sixty-five years and one quarter, if the three lives should so long live: and covenanted, that if either of the lives should drop during the term, *he would apply for, and do his utmost endeavors to procure a renewal of the letters patent* for another life. Five-sixths of the interest of *I.* and *H.* became vested in the plaintiff. In 1828 (when the annual rack-rent value of the premises was 21,095*l.*), one of the lives dropped. *W. C.* applied for a renewal, but the duchy demanding a fine of 64,210*l.*, he refused to pay it, and in 1833 presented a petition of right, and afterwards filed a bill against the Lords of the Treasury, which was ultimately dismissed. The other two lives dropped pending the suit. In an action upon the above covenant against the administrator of *W. C.*, *Held*—

First, that the fine was properly calculated on the rack-rent, and not on the receipts of the lessee.

Secondly, that, the fine demanded not being unreasonable, there had been a breach of covenant incurred by the non-payment thereof.

Thirdly, that the covenant ran with the land.

Fourthly, that the covenant could be apportioned, so as to enable the plaintiff as assignee of five-sixths of the premises, to sue thereon.

(*a*) The duchy has no great seal of its own. When the duchy is vested in the Crown, the duchy leases are granted under the great seal of the kingdom, or the seal of the Court of *Exchequer* (see 1 Car. 1, c. 2, s. 1); when in the Prince of *Wales*, the leases are granted under *his* great or privy seal (see 33 G. 3, c. lxxviii).

should be entitled to the said letters patent, and the premises thereby demised in order to confirm the said term thereby granted in the said premises to *I.* and *H.*, their executors, &c., absolutely should and would, from time to time, when either of them, the said Sir *W. C.*, *G. C.*, and *J. M.*, or any other person whose life should be nominated and appointed in any future letters patent, in his or their place or stead, should happen to die during the said term of sixty-five years and one quarter, *apply for, and do his and their utmost endeavors to procure a renewal* or renewals of such letters patent for another life or lives: so as the said *I.* and *H.*, their executors, &c., might hold and enjoy the premises thereby demised for the whole of the said term of sixty-five years and one quarter of a year thereby demised, subject only to the rents and covenants, &c., and without the said *I.* and *H.*, their executors, &c., being compelled, or compellable, or liable to pay any part of the fine or fines that should be paid on such renewal. Covenant for quiet enjoyment. The declaration then stated the entry of the lessees, and several *mesne* assignments, by which five-sixths of the premises became vested in the plaintiff; that on the 11th of *October*, 1828, *G. C.* died; that on the 28th of *July*, 1833, *J. M.* died; and that on the 26th of *January*, 1834, Sir *W. C.* died. *Breach*, that Sir *W. C.*, in his lifetime, did not, either on the death of *G. C.* or *J. M.*, in order to confirm the said term granted in the said premises to *I.* and *H.*, absolutely apply for and do his utmost endeavors to procure a renewal of the said letters patent for another life or lives, so as the plaintiff might hold and enjoy the said demised premises for the whole of the said term of sixty-five years and one quarter, subject only to the rents, &c., but wholly neglected, &c.; that thereupon, and by reason thereof, and on the death of the said Sir *W. C.*, the said term granted to *I.* and *H.* ceased, and became and was ended and determined: by means of which several premises the plaintiff lost and was deprived of all the rents, profits, benefits and advantages which would have arisen and accrued to him from the performance of the covenant of Sir *W. C.* in that behalf.

Plea, that Sir *W. C.* did, on the death of *G. C.* and *J. M.*, respectively, in order to confirm the said term granted in the premises to *I.* and *H.*, absolutely apply for and do his utmost endeavors to procure a renewal of the said letters patent for another life and lives.

The case was turned into a special verdict, which stated, that between the years 1671 and 1765, seven leases of the property in question had been successively granted by the duchy of *Cornwall* to the *Clayton* family, for terms not exceeding thirty-one years; the first, for a fine of 288*l.*, and a rent of 50*l.*; the second, for a fine of 532*l.* 6*s.*, and a rent of 50*l.*; the third, for a fine of 350*l.*, and a rent of 16*l.* 10*s.* 9*d.* (the residue of the 50*l.* rent having been discharged for a fine of 234*l.* 4*s.*); the fourth, for a fine of 354*l.*, and a rent of 16*l.* 10*s.* 9*d.*; the fifth and sixth, for the same fine and rent; and the seventh, for a fine of 690*l.*, and a rent of 16*l.* 10*s.* 9*d.*

In 1776, a private Act was passed, entitled "An Act to enable *W. Clayton*, Esq., during his life, and the guardians of his infant children, after his decease, to make building and improving leases of certain lands and premises, part of the manor of *Kennington*, in the county of *Surrey*, held by letters patent of the duchy of *Cornwall*, and to raise money for the payment of the fines and expences of renewing the said letters patent, and for defraying the expences to attend the granting building and improving

leases;" by which, after reciting, (*inter alia*) that the said premises held under the before-mentioned letters patent, were then let to divers tenants at rack rents, by and under leases for several terms of years, at several yearly rents, amounting in the whole to the yearly rent of 327*l.*; that other parts of the property were let to tenants at will, at the yearly rent of 31*l.*; that it was apprehended and believed that many persons would be willing to enter into contracts for and take leases in possession or reversion of many parts of the said premises, for the purposes of building or improvements, and would pay considerable improved yearly rents for the same; that some of the tenants might be willing to surrender their then present lease or leases upon reasonable satisfaction being made to them for the same, which would be amply compensated by the great increase of rent such building lease or leases would produce; that the said *W. C.* had applied to the Lords of his *Majesty's* Treasury to accept of a surrender of the then present lease, and for the grant of a new lease for the term of ninety-nine years, determinable at the end of three lives, which their lordships had agreed to do; it was enacted, amongst other things, that it should and might be lawful to and for the said *W. C.* the elder, and others specified in the Act, from and after the obtaining of the said letters patent or lease from his Majesty, for the term of ninety-nine years, determinable as aforesaid, from time to time to demise, or to contract for the demising, all or any part of the said premises, unto any person or persons who should be willing to build upon, or in any other manner improve the same, for any term or number of years, in possession or reversion, not exceeding ninety-nine years, to be computed from the 5th of *April*, 1776, determinable on the dropping of such lives as should be mentioned and contained in the said letters patent, or lease so intended to be granted; so as upon every such lease there should be reserved and made payable, during the continuance thereof, the best and most improved yearly rent or rents that could be reasonably had or obtained for the same, and so as no fine or income should be taken for the same; that it should and might be lawful to and for the said *W. C.* the elder to enter into a covenant in all or any of the leases to be by him respectively granted by virtue of the said Act, that he, and all other persons claiming under him, should and would, from time to time, and as often as occasion should be or require, apply for and, *in case the same could be obtained on reasonable terms*, procure such a renewal of the said lease or letters patent as should from time to time enable him or them to complete and make up the full term for years which should be so granted or be contracted to be granted; and that so often as the said premises should be renewed by the said *W. C.* the elder, or by any other person or persons claiming under him, he, the said *W. C.* the elder, or such other person who for the time being should procure such renewal of the said lease or letters patent, should and would, upon the request of any person who for the time being should be entitled to the term of years then subsisting in such lease as should be so granted by the said *W. C.* the elder, grant to him or them such further or other lease or term for years of and in the respective premises so leased by the said *W. C.* the elder, as would, from time to time, make up his term or number of years the full and complete term or number of years which in and by such original lease so to be granted by the said *W. C.* the elder, should be or be agreed to be granted, so as the

person requesting such further lease should pay unto the person who should have procured such renewed lease or letters patent as aforesaid, such sum of money as should be an equal share of the fine or fees which should have been paid for procuring such renewed lease or letters patent, in such proportion as the annual rent of the premises to be comprised in such further lease, should bear to the annual rent of the whole of the said premises to be comprised in such renewed lease or letters patent; save and except as to such fine and fees as should be paid for any renewal or renewals of the said lease or letters patent which should be procured within the last twenty years of such term or terms as should be granted or be contracted to be granted by the said *W. C.* the elder. And the said Act empowered *W. C.* the elder to borrow money, on mortgage, to reimburse himself; so much money as he should pay or lay out for the fine or fees to be paid for granting or renewing the said therein-before mentioned lease or letters patent from his *Majesty*.

By letters patent of the 5th of *March*, 1777, in consideration of the surrender of the former letters patent, and of a fine of 468*l.*, and a rent of 16*l.* 10*s.* 9*d.*, the officers of the Crown, during the minority of the then *Prince of Wales*, demised and granted the premises to trustees for the *Clayton* family for ninety-nine years, if *W. C.*, *G. C.*, and *J. M.* should so long live.

The value of the interest surrendered by *W. C.*, as part consideration for the granting of the new letters patent, was, in the then present money, equal in value to a sum of 1006*l.* 18*s.*, payable nineteen years thereafter; that is to say, at the expiration of the term surrendered by *W. C.*, as aforesaid.

Divers demises and leases, in all twenty-five in number (one of the leases having been made by the said *W. C.*, in the Act of Parliament mentioned, in pursuance of the power and authority thereby given him, and containing the covenant, on the part of the lessor, to apply for a renewal, and, on the part of the lessee, to contribute to the fine to be paid on such renewal as in the Act mentioned, and the remaining twenty-four of the said leases, including therein the lease to *I.* and *H.*, in the declaration mentioned, having been made by Sir *W. C.*, after he became entitled to the rents and profits of the estate and premises as aforesaid, and each of the leases containing the like covenant for renewal, and being a demise of a certain part of the premises mentioned and comprised in the letters patent for a term of years therein mentioned, determinable as therein mentioned), were duly granted; and by the several leases aforesaid, the whole of the premises mentioned and comprised in the letters patent were demised and leased.

The terms created by the said leases were generally for long terms of years; ranging from ninety-seven to twenty-four years; and were, with the exception of the last-mentioned one, respectively subject to be determined by the death of *W. C.*, *G. C.*, and *J. M.*, in the declaration mentioned; at the time of this action, one only of the terms for which the leases were granted (*viz.*, the said term of twenty-four years), had expired or run out by effluxion of time, or had ceased or determined otherwise than by the deaths of the three before-named parties; and but for the same deaths, the terms so granted, except as aforesaid, would have continued for many years. The total amount of rent or income which, during the existence of the said terms of years, was or could be received by Sir *W. C.* from the premises comprised in the letters patent, was the annual sum of 1238*l.* 7*s.* 6*d*

Of the twenty-five leases, nine were granted previous to the lease to *I.* and *H.*, and fifteen subsequently thereto. Six of such leases were granted at peppercorn rents, and in one other of the leases, comprising one-sixth part of the whole premises demised by the letters patent, there was contained a covenant, on the part of the lessee, to pay an equal share of the fine and fees to be paid on any renewal of the said letters patents, in such proportion as the annual rent of the premises demised to such lessee bore to the annual rent of the whole of the premises comprised in the letters patent, with a covenant, on the part of such lessee, to build houses. In three other of the leases there was contained a covenant to contribute one-twentieth part of the fine to be paid upon any renewal of the said letters patent. Eight of the leases, prior in date to the lease to *I.* and *H.*, were granted in consideration of contracts to cover the whole frontage of the land thereby demised, with good and substantial dwelling houses. The fifteen leases granted subsequently to the lease to *I.* and *H.*, were also granted in consideration of contracts to build houses.

On the 29th of *September*, 1791, Sir *W. C.* received a fine of 1200*l.*, as the consideration for granting one of the leases; and on the 23d of *September*, 1802, a fine of 1400*l.*, as the consideration for granting one other of the leases; such two last-mentioned leases being two of the leases above-mentioned to have been granted at peppercorn rents.

The plaintiff was in no wise party to or cognizant of any such leases, or the terms and conditions thereof, save the said lease in the declaration mentioned.

Sir *W. C.*, on the 1st of *August*, 1789, by an indenture of lease then made between him, of the one part, and *I.* and *H.*, of the other part, did demise, &c., unto the said *I.* and *H.*, their executors, &c., certain parcels of land, in the indenture and in the declaration particularly described, and on the terms and conditions in the declaration mentioned.

By divers *mesne* conveyances and assurances, five-sixth parts of the estate and interest of the said *I.* and *H.* in the premises demised under the said indenture of the 1st of *August*, 1789, vested in the plaintiff.

On the 11th of *October*, 1828, *G. C.*, one of the lives named in the letters patent, died.

On the 17th of *October*, 1828, Sir *W. C.* applied to the Crown for a renewal, which application was frequently repeated; and in *September*, 1831 (the death of *George* the 4th having intervened), the Crown, in reply to Sir *W. C.'s* application, demanded a fine of 46,917*l.* and a rent of 1000*l.* a year; or a fine of 64,210*l.* without a rent.

This demand was resisted as unreasonable: two memorials were sent in, signed by the plaintiff and other sub-lessees, shewing the hardship of their case, and a fine of 30,000*l.* was offered by them; this being refused, Sir *W. C.*, in *March*, 1833, presented a petition of right; but the Attorney General objecting to that course of proceeding, and consenting to become a defendant in a bill in *Chancery*, a bill was, in *July*, 1833, filed by the said Sir *W. C.* against the Attorney General, whereby it was alleged as a custom "that the manor of *Kennington*, with the demesne lands situate in or near the parish of *Lambeth*, in the county of *Surrey*, is parcel of the possessions of the duchy of *Cornwall*, and such demesne lands are, and have been, usually granted or demised

for terms of years, at fixed annual rents; and such leases have been constantly renewed at fines which have hitherto been assessed in a certain and established manner; that such grants or demises of the said demesne lands have been at all times made to a few persons only, who thereby become and are the chief or immediate tenants to the duchy of *Cornwall*, but by whom the lands have been again usually demised or sub-let, in small portions, to under tenants; that large portions of such demesne lands, and particularly such parts thereof as are hereinbefore described, were originally of very little or no value, being marshy and wholly uncultivated, and requiring a great expenditure, to an amount exceeding the full value thereof, before the same could be made applicable to any useful purpose; that, in consequence thereof, and in order to promote the cultivation and draining and improvement of the said lands, and, at the same time, to provide for a just correspondent increase of the revenue of the said duchy, a certain fixed tenure or mode of letting (the date and commencement of which are unknown), was introduced, and has been uniformly established and adhered to; whereby the said lands have been from time to time let to the tenants and their assigns, at certain small fixed annual rents, and such leases have been, from time to time, renewed, on payment of reasonable fines, ascertained by a certain fixed mode of calculation, which fines have, in all cases, never exceeded the amount of *two years' gross rent, and deducting one third for repairs and other out-goings, or what was deemed equivalent thereto, one and a half year's net annual value of the lands demised;* and thus the tenants, having a certain established right, were encouraged to improve the said estates, and the duchy derived the benefit thereof in the augmented fines of successive renewals; that, pursuant to such custom, portions of such demesne lands hereinafter described, have, from a period beyond memory, from time to time, been granted and demised by the Duke of *Cornwall* for the time being, to persons under whom the ancestors of the plaintiff derived title, and to the plaintiff and his ancestors, for terms of years, and that in all such leases a rent, then called and being an ancient yearly rent of 16*l.* 10*s.* 9*d.*, has been constantly reserved and made payable, and such leases have, according to the custom, been renewable, and have, in fact, from time to time, been renewed, in consideration of the payment, at each renewal, of a reasonable fine or premium, which has been uniformly calculated and assessed according to, or in conformity with, such established rule or standard as aforesaid."

In the same month of *July*, after the bill was filed, *J. M.* (another of the lives mentioned in the letters patent), died.

The Lords of the Treasury put in their answer to the bill, but before the cause could be heard (*viz.*, in *January*, 1834), Sir *W. C.* (the third life), died. A bill of revivor was filed by his administrator; and the said suit, and the matters thereof were, on the 29th of *May*, 1834, brought before the Court of *Chancery* for hearing and determination, by or on behalf of Sir *W. R. C.* (the present defendant), upon a motion for an injunction to restrain the defendants in the said suit from granting leases of the said property, which had been formerly held by Sir *W. C.*, and of which the premises demised by the indenture of the 1st of *August*, 1789, formed part.

On the 11th of *June*, 1834, the Lord Chancellor gave judgment against

Sir *W. C.'s* claim to a renewal of the letters patent, and dismissed the motion, but without costs (*b*).

No other persons were, either before or after the making of the indenture of the 1st of *August*, 1789, nominated in any letters patent granted from the duchy of *Cornwall*, in the place of *G. C.*, *J. M.*, or Sir *W. C.*, or either of them, and upon the death of Sir *W. C.*, as hereinbefore mentioned, the terms respectively granted by the letters patent of the 5th of *March*, 1777, and by the before-mentioned indenture, ceased and determined.

All the various proceedings taken by Sir *W. C.* down to the time of the Lord Chancellor's judgment, on the 11th of *June*, 1834, were sanctioned by the plaintiff.

The annual rack-rent value of the premises demised by the letters patent, was, at the time of the death of *G. C.* in *October*, 1828, 21,095*l.*, and if the fine so demanded by the duchy of *Cornwall* for a renewal of the letters patent, ought to be calculated on the annual value of the premises, taken at a rack-rent, the jury found that the fine demanded in *September*, 1831, was, *on such calculation, a reasonable fine.*

That one moiety of the rents received by Sir *W. C.*, annually laid by, would exceed the fine demanded by the duchy of *Cornwall* at the time the same was so demanded; and the value of the fines of 1200*l.* and 1400*l.*, paid to Sir *W. C.* as a consideration for the granting of two leases, as aforesaid, would, at the like period, if they had accumulated at the rate of 4 *per cent. per annum.*, amount to the sum of 9001*l.*

That Sir *W. C.* was always ready and willing to take, and that he offered to his *Majesty's* special commissioners for managing the affairs of the duchy of *Cornwall*, to take, and that *he used his best endeavours to obtain a renewal* of the letters patent for another life or lives, upon the terms stated in the memorials presented, and in the bill filed in the Court of *Chancery* on his behalf, and to pay for the said renewal a fine, to be estimated in any of the modes, or upon any of the principles pointed out and stated on behalf of Sir *W. C.* in the said memorials, or the said bill.

That Sir *W. C. did*, on the death of *G. C.* and *J. M.* respectively in order to confirm the term granted to *I.* and *H.*, *absolutely apply for and do his utmost endeavours to procure a renewal* of the letters patent for another life and lives, so that the plaintiff might have and enjoy the said demised premises for the whole of the said term of sixty-five years and one quarter, subject only to the rents and covenants in the indenture contained, according to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant of Sir *W. C.* by him in that behalf made; unless it was incumbent on him, in point of law, to pay the fine required by the duchy, or to do any other act or acts than those by the jurors above stated. But whether or not, &c.

The points marked for argument were as follows:—

On the part of the plaintiff, it will be contended,

First, That the covenant stated in the declaration, is to be construed without reference to former letters patent, or to any other leases, and that neither those letters patent or leases are evidence in the cause.

(*b*) See note (*b*), *post*, p. 312.

Secondly, That Sir *W. Clayton*, by his covenant to use his utmost endeavors to obtain a renewal, was bound to pay, or to offer to pay, such a fine as that renewal was marketably worth, upon the respective deaths of *George Clayton* and *James Medwin*.

Thirdly, That the fine so to be paid, was properly calculated on the annual rack-rental, or improved value of the property held under the letters patent, and therefore, it was incumbent on Sir *W. Clayton* to pay the fine demanded by the duchy on the 12th of *September*, 1831, and that he broke his covenant by omitting to do so.

Fourthly, That Sir *W. Clayton* likewise broke his covenant upon the death of *James Medwin*, by omitting to propose to the duchy proper terms for a renewal of the letters patent, and by persisting in useless and vexatious litigation.

The defendant will contend that the question whether Sir *W. Clayton* did, on the death of *G. Clayton* and *J. Medwin*, respectively, apply for and do his utmost endeavours to procure a renewal of the letters patent in the declaration mentioned, so that the plaintiff might have and enjoy the demised premises for the whole of the term of sixty-five years and one quarter, subject only to the rents and covenants in the lease contained (being the only issue raised by the pleadings), was and is a question of fact for the determination of the jury; that the jury have found, as a matter of fact, that the said Sir *W. Clayton* did so apply for, and did his utmost endeavours to procure a renewal of the said letters patent, according to his covenant, unless it was incumbent on him, in point of law, to pay the fine required by the duchy, or to do any other act or acts than those by the jurors in their verdict stated; that it was not incumbent on Sir *W. Clayton*, in point of law, to pay the fine demanded by the duchy, or to do any other act or acts than those by the jurors found. And further, that the acts done by Sir *W. Clayton*, as found by the jurors, shew a sufficient performance of the covenant to entitle the defendant to the judgment of the Court upon the special verdict.

Failing in this, the defendant will contend that the judgment must be arrested;

First, because the covenant declared on is not a covenant which runs with the land, so as to enable the plaintiff, as assignee of the term, to sue for a breach of that covenant.

Secondly, because it appears, by the declaration, that the plaintiff was possessed of a part only; *viz.*, of three undivided fourth parts, and of one third part of the remaining fourth, and not of the entirety of the demised premises for the term granted; whereas the assignee of a part only of the demised premises cannot, by law, sue alone for a breach of the covenant in question, which cannot be apportioned.

In *Easter Term*, the case was argued by the *Recorder* (the Hon. *C. E. Law*; with whom were *Wilde*, Serjt., and *Shee*), for the plaintiff; and *Platt*, Q. C. (with whom were *Thesiger*, Q. C., and *Channell*), for the defendant.

Upon the question, whether the fine was properly calculated on the improved value, *Halton* v. *Hassel* (*c*), was cited for the plaintiff, and

(*c*) 2 Stra. 1042.

Wilson v. *Hoare* (*d*), for the defendant. As to whether the covenant declared on was a covenant running with the land, for the plaintiff were cited *Moore*, 159 (*e*), the second resolution in *Spencer's Case* (*f*), *The case of The Prior*, there referred to (*g*), *Isteed* v. *Stoneley* (*h*), *Bally*

(*d*) 2 B. & Ad. 350.

(*e*) "*Hil.*, 26 El., *Gawdy* moved, on the Statute of 32 H. 8 (c. 34), which enables grantees of reversions to enter for (non-performance of) conditions, and to bring actions of covenant: and also enables the tenants of particular estates to have an action of covenant against the said grantees. The question was, if a lessee for life covenant for himself, his executors, and administrators, to build a wall within his term, and afterwards he assign over his estate, if the grantee of such reversion, or the grantor shall have (an action of) covenant against the assignee; and they all agreed so (that such action would lie), for *Meade* said, that the Statute is, that the grantees shall have the like remedies, by entry or action, against the assignees, &c., as they might (have) against the lessees themselves. And notwithstanding that the covenant want the word *assigns*, yet each assignee, by the acceptance of the possession, has made himself subject to all the covenants concerning the land, but not to collateral covenants; and covenants of repairs and building of walls or houses, are covenants inherent to the land, with which the assignee, (even) without special words, shall be charged. Also *Gawdy* remembered a case which was now lately adjudged in the *Common Bench*, where *a lessor for years covenanted in his lease that, at the end of the term, he would make a new lease to the lessee or his assignees, and afterwards granted over his reversion, and at the end of the term the lessee brought covenant against the grantee, to which also all the justices and serjeants agreed.*" This case was cited at the bar for the principle contained in it, which is here printed in italics: the case itself would appear to be the same as that which is reported in 5 Rep. 16, a, under the name of *Spencer's Case*: that case, however, is said to have been decided in *Euster*, 25 El., and the Court there are said to have resolved that the action would *not* lie against the assignee (not being named), because the covenant concerned a thing not *in esse* at the time of the demise made.

(*f*) 5 Rep. 16, a.

(*g*) Cited from 42 E. 3. 3.

(*h*) 1 Anders. 82: "*Thomas Isteed*, executor of *Joan Istecd*, executrix of *Richard Isteed*, brought an action of covenant against *Richard Stoneley*, assignee of *Jeffery Morley*, assignee of the Queen, sister and heir of Queen *Mary*, sister and heir of King *Edward*, son and heir of King *Henry*, assignee of the prior and convent of St. *Pancrace*, of *Lewes*, and declared that the said prior, by his deed indented, dated, &c., demised to the said *Richard Isteed*, the land named *Newik Wood*, for a term of fifty years; and in the same indenture, he granted as follows: to wit, *and further, the said prior and convent have granted, for themselves and their successors, that it should be lawful for the said Richard Isteed and his assigns, at any time or season within the said term, or at the end of his said term, to have his said demise renewed for so many more years, he or his assigns paying for a fine to the said prior and convent, and their successors, 40s., yielding*, &c.; and counted further how the reversion came to *Henry* the 8th, and from him to the Queen, and from her to the defendant; and further, how the lease came to the plaintiff, according to the contents of the writ, and the defendant (being so) seised of the reversion, and the plaintiff (being so) possessed of the lease, the plaintiff came to the defendant to have the said demise (so) made to the said *Richard Isteed*, renewed to (him) the said *Thomas Isteed*, the plaintiff, for the term of fifty years, and that he offered him the fine of 40*s.*; but the said defendant refused to make the lease, or take the money, and therefore, he had broken the aforesaid covenant, upon which matter the defendant demurred. And it was argued by the serjeants once at the bar, and moved that this action does not lie against the assignee of the reversion by the Statute of 32 Hen. 8. Now although the Statute, in words, be general to give the (action of) covenant against the grantees of reversions, yet here it is not so generally to be taken; for of covenants which do not depend upon the interest of the land, but are collateral things, the grantees of reversions shall not take the advantage, nor by consequence shall they be bound by them; as if the covenant were for the lessor to deliver annually to the lessee

v. *Wells* (*i*); *Hyde* v. *Skinner* (*j*); *Roe*, d. *Bamford* v. *Hayley* (*k*); *Vyvyan* v. *Arthur* (*l*); *Sampson* v. *Easterby* (*m*); and *Shepherd's Touchstone* (*n*); and for the defendant, *The Mayor of Congleton* v. *Pattison* (*o*). The learned counsel relied also upon *Spencer's Case* (*p*), and the note in that case in *Smith's Leading Cases* (*q*); and *Com. Dig.* Condition (O) (Q.)

As to the apportionment of the covenant, the plaintiff relied upon *Gammon* v. *Vernon* (*r*); *Congham* v. *King* (*s*); *Stevenson* v. *Lambard* (*t*); *Hare* v. *Cator* (*u*); and *Merceron* v. *Dowson* (*v*).

Cur. adv. vult.

TINDAL, C. J., now gave judgment.—The special verdict in this case has been found in an action of *covenant* brought by the plaintiff, who claims as assignee of *five-sixths* of the interest of the original lessee, against the defendant, as administrator of the lessor.

It appears upon the record that the lessor, *William Clayton*, Esq., afterwards Sir *William Clayton*, Bart., at the time of granting the lease, held the premises in question (*inter alia*), by letters patent, under the great seal of the duchy of *Cornwall* (*w*), for the residue of a term of ninety-nine years, if he, the said Sir *William Clayton*, *George Clayton*, his brother, and *James Medwin*, should so long live; and that the said Sir *William Clayton*, by indenture of lease, dated the 1st of *August*, 1789, demised two parcels of land therein described, being part of the premises comprised in the duchy lease, to *Ismay* and *Harrison*, to hold to them, their heirs, executors, administrators and assigns, for sixty-five years and one quarter of a year, from the 24th of *June* last preceding, if the three persons named in the said letters patent, or if any other person or persons who should be nominated (in manner therein described), in any future letters patent of the said premises, should

10*l.* during the term, or to have repaired a bridge, not being upon the land leased, these (covenants) would not bind the grantee of the reversion, and if they were made by the lessee, the grantee of the reversion shall not take advantage of them; for the law never intended other covenants than such as depend upon the land, as to repair a messuage, fences, &c., payment of rent, penalties for non-payment, and the like; and therefore this covenant is but a collateral thing, and does not depend upon the first term, nor upon the land during the aforesaid term; but it is to make a new term, which is as if the lessor had covenanted by the deed to have made a lease of other lands which were not let; in this case, the grantee of the reversion shall not be bound for the performance of this covenant for the above-mentioned reason, and so it seems reason here. But it was (agreed?) (a) after the argument, to have others to argue the said case, who shewed faults in the form of the declaration; upon which judgment was stayed, and not upon the matter and point in law; for *Dyer*, *Chief Justice*, declared his opinion to be with the plaintiff as to the matter in law, and the other judges were of the same opinion, as I afterwards heard themselves report."

(*i*) 3 Wils. 25; S. C. Wilm. notes, 341.
(*j*) 2 P. Wms. 196.
(*k*) 12 Ea. 464.
(*l*) 1 B. & C. 410; 2 D. & R. 670.
(*m*) 9 B. & C. 505; 4 M. & R. 422; S. C. in error, 6 Bing. 644; 4 M. & P. 601; 1 C. & J. 105.
(*n*) Pa. 176.
(*o*) 10 Ea. 130.
(*p*) *Ut supra.*
(*q*) Vol. 1, p. 27.
(*r*) 2 Lev. 231.
(*s*) Cro. Car. 221.
(*t*) 2 Ea. 575.
(*u*) 2 Cowp. 766.
(*v*) 5 B. & C. 479; 8 D. & R. 264.
(*w*) See note *ante*, p. 299.

(a) Some such word appears to be omitted in the original.

so long live. And after setting out the covenant by the lessor, as to procuring a renewal of the letters patent when any of the lives should fall in, upon which the breach is afterwards assigned, and also a covenant for quiet enjoyment; it appears, by the record, that the precise issue raised for the determination of the jury was this:—whether the said Sir *William Clayton*, the lessor, did, on the death of *George Clayton* and *James Medwin* respectively, in order to confirm the said term granted to *Ismay* and *Harrison*, absolutely apply for, and do his utmost endeavour to procure a renewal of the said letters patent for another life and lives, so as the lessees, their executors, administrators or assigns might hold and enjoy the said demised premises for the whole of the said term of sixty-five years and one quarter of a year, subject only to the rent and covenants in the indenture of demise contained.

The main question, therefore, between the parties, turns upon the proper sense and meaning of the covenant; for when the intention of the contracting parties is once ascertained from the covenant itself, it is not difficult to decide whether the fact found by the jury, upon the special verdict, amounts to a performance thereof or not. The lessor covenanted that he would, when either of the *cestuique vies* happened to depart this life, during the term of sixty-five years and a quarter, "apply for, and do his utmost endeavours to procure a renewal of the letters patent for another life or lives." There can be no difficulty in construing the meaning of the former part of the covenant, *viz.*, "that the lessor should *apply* for a renewal of the letters patent;" and there can be as little difficulty in arriving at the conclusion, upon the facts found, that the lessor did fully satisfy and perform this, the first part of the covenant, when the life of *George Clayton* fell in, by making application for the renewal in the proper quarter, repeating his application with great urgency, and pressing it by every means in his power. This appears both from the facts found by the jury, and also from the various documents set out in the special verdict, perhaps at greater length, and with more of prolixity than was absolutely necessary for the establishment of that point. But the more difficult question remains, namely, what construction is to be put upon the latter branch of the covenant, "that he would *do his utmost endeavours* to procure a renewal of the letters patent." That the parties did not mean that the lessor should bind himself to procure a renewal at all events, is evident from the very words of the covenant. The subject-matter of the covenant leads also to the same conclusion. The lessor could not compel the duchy of *Cornwall* to renew any life or lives as they fell in. The duchy was not compellable to renew, either by any statutory obligation, any prescriptive liability, or any covenant. So far as appears upon the special verdict, the renewal was a matter of compact and agreement only. The fact found, that in four out of the seven instances of letters patent granted to the family of Sir *William Clayton*, and set out in the special verdict, the fine paid upon the renewal of each was of very different amount, affords the strongest proof that such amount was matter of compact and agreement, and nothing else. When, therefore, the lessor covenanted "that he would do his utmost endeavour to procure a renewal for another life," the necessary intendment is, that he covenanted to do every thing that was known to be usual, necessary, and proper for the insuring the success of his endeavour, of which, as it appears to us, the very first step was, to bargain with the duchy for such a fine as would induce them to renew, and to pay

such fine. Sir *William Clayton* had himself paid a fine on the granting of the letters patent (*x*), under which he then held, and all his predecessors had done the same, as they renewed in succession. It could not, therefore, but have been known to him, that doing his utmost endeavour, must necessarily have comprised the payment of *some* fine to the duchy; and any doubt upon such interpretation of the covenant under consideration, must be removed by the concluding terms of the covenant itself, for the covenant goes on thus: "without the said lessees being compelled, or compellable, or liable, to pay any part of the fine or fines that should be paid on such renewal;" words which we consider to be capable of only one interpretation, namely, that both the lessor and the lessees understood that some fine was to be paid on renewal of the letters patent; but that it was agreed between them that the whole of such fine, whatever might be its amount, should be borne by the lessor alone. Now, if the performance of the covenant had become impossible, by reason of the absolute refusal of the duchy to renew, on any terms whatever, no doubt the defendant would have excused himself from any breach, by shewing that he had used his utmost endeavour, though ineffectually, to procure the renewal; for *that* was all he had covenanted to do. Or again, if the officers of the duchy had refused to renew except upon the payment of a fine, extravagant and unreasonable in proportion to the value of the property, there seems little doubt but that such a refusal on their part would have equally excused the covenantor, as amounting, in effect, to an absolute refusal to renew; for the covenant must have a reasonable construction, and it never could have been intended by the contracting parties, that by doing his utmost endeavour, he was called upon to do more than to pay a reasonable fine; that is, the fair and marketable price, according to the actual value of the estate at the time when it became necessary to put in a new life. And we, therefore, think the whole of the inquiry, as to the breach of the covenant having been incurred or not, is narrowed to this single point: whether it appears, upon the facts found, that Sir *William Clayton* has been ready to pay to the duchy a reasonable fine for putting in a new life; which is, in effect, the same question as that contained in the concluding words of the special verdict: "whether it was incumbent on him, in point of law, to pay the fine required by the duchy." Now, the special verdict finds, in terms, that the fine demanded by the duchy of *Cornwall*, in *September*, 1831, for the renewal of the letters patent upon the death of the said *George Clayton*, was a reasonable fine, if such fine ought to be calculated on the annual value of the premises, taken at rack rent. And if it is to be considered as a question of law, whether the fine demanded was reasonable or not, we have no difficulty in saying that, in our judgment, *a fine which falls short in amount of three years' annual value of the premises, cannot*, upon any principle of law, or analogy to cases which have any bearing on the subject-matter of inquiry, *be deemed unreasonable* (*y*). But the question still arises, and it is that upon which considerable argument has been raised, whether the duchy can calculate the amount of their fine, not by reference to the rent paid by the lessee, but upon the rack-rent of the houses, which is paid by the tenants in actual occupation. Now, in the first place, we see no rule of law, nor has any

(*x*) The fine was paid by *William Clayton*, Esq., the father of Sir *William Clayton*.

(*y*) See note (*z*), *post*, p. 311.

such been pointed out to us, by which the duchy is called upon to look to any other value of the premises at the time when they are contracting for the renewal of the letters patent, than the actual value of the premises at that time at the rack-rent. If the premises, instead of being demised to sub-lessees, had been built upon and improved by the immediate lessee of the duchy, at his own expence, there could have existed no better criterion or test of the real annual value of the premises, than the rent actually received by the lessee from the tenants in possession of the houses, built by himself on the land. And the right of the duchy to assess and claim a particular amount of fine upon renewal, appears to us to be precisely the same, whether the improvements have taken place by the act, and at the expence of the lessee, or at the expence of others, to whom such lessee has sub-demised the land. There is no privity between the duchy and the sub-lessee; the duchy is not bound to take notice that there is any sub-lease in existence; all that must necessarily come to the knowledge of the duchy is, the annual value of the land at the time when the renewal is required. But in the second place, the point now under consideration bears a very close analogy to that of a fine claimed by the lord of a manor upon the admission of a new tenant to a copyhold, where the estate has been improved during the continuance of an old lease granted by a former copyhold tenant under a license from the lord; in which case it has been held, that the lord may calculate his fine upon the actual improved value, though it exceeds the amount of the annual rent received by the tenant himself; *Sir William Halton, Bart.*, v. *Hassell* (*z*); a case much stronger than the present, as the lord of the manor is bound to admit on payment of a reasonable fine. We cannot, therefore, hold that the fine demanded by the duchy for the renewal of the letters patent on the death of *George Clayton, falling short in amount, as it does, of three years' actual value of the premises at a rack-rent* (*a*), is any other than a reasonable fine. And as it appears upon the facts found, that Sir *William Clayton* declined or neglected to renew, upon the payment of that fine, we think he has not, within the proper meaning of the covenant, done his utmost endeavour to procure a renewal of the letters patent. And even in the calculation of the amount of the fine, which he professed himself willing to pay, it does not appear that he allowed for the *full* annual value of the premises to himself; for although he included the whole of the annual rents which were paid to him, he did not make allowance for the fines which in some instances he had taken upon granting the leases. And such being the view we take of the breach of the covenant on the death of *George Clayton*, the same reasoning must apply to the endeavour to procure a renewal upon the death of the

(*z*) 2 Str. 1042.

(*a*) The fine, in fact, demanded by the duchy, was (see *ante*, p. 303) - - - - £64,210
The rack-rent was (see *ante*, p. 305) - £21,095
Which, multiplied by - - 3

Produces - - - - - 63,285

Which, deducted from the amount claimed for the fine, leaves - - - - 925 *plus* the "amount of the three years annual value of the premises," calculated at the rack-rent.

next life, *James Medwin*: and it is, therefore, unnecessary to say more, than that there appears to have been a second breach of the covenant upon the occasion of his death.

The defendant, however, has urged two objections against the right of the plaintiff to recover in this action. In the first place, he contends that the covenant upon which the action is brought, is not a covenant which runs with the land; as to which we can feel no doubt, but that *a covenant made with the lessee to procure the original letters patent to be renewed, and the lease itself under which the tenant holds, to be confirmed absolutely for a certain term, is, of all others, a covenant which more strictly and peculiarly may be said to run with the land than any other; inasmuch as it affects the very existence and continuance of the term itself created by the lease.* And the judgment of the Court of *King's Bench*, in the case of *Doe* v. *Hayley* (*b*), affords an authority directly in point upon the subject.

It is further objected, that the plaintiff, being assignee of part only of the interest of the original lessee, cannot sue upon this covenant to procure a renewal of the letters patent, inasmuch as such covenant cannot in its nature be apportioned. For in what manner, it is asked, can the defendant procure a renewal of five-sixths of the interest which passed under the duchy lease? And again, if the assignee of the remaining one-sixth should be unwilling to continue tenant as to that interest, is the defendant compellable to take to it himself? The latter difficulty, however, does not seem to apply to the case. The original lessees, *Ismay* and *Harrison*, took an interest for sixty-five years and a quarter, not only if the three lives named in the duchy lease should so long live, but if any other person or persons, to be nominated upon the falling in of their lives, should so long live; it being declared to be the object and intention of the renewal that the lessee's interest should be confirmed absolutely for sixty-five years and a quarter. It is not, therefore, optional in the assignees of the original lessees to declare whether they will take any interest after such renewal or not; they take for the whole term, if the duchy lease is renewed for that term, from time to time. And as to the right of the plaintiff to sue, without joining the assignee of the remaining one-sixth, it is to be observed, that the plaintiff and the assignee of that interest are tenants in common, having separate and distinct interests in the term; and that the damages are, in their nature severable and may well be apportioned by the jury, according to the value of the share of each. And *no case appears to have laid it down that tenants in common* must *join in an action of* covenant; the utmost that has been established seems to be, that tenants in common *may* join in those actions of covenant which are merely personal and several in damages only, as on the covenant to repair (1 Lev. 109; Raym. 80.)

Upon the whole, therefore, it appears to us that, notwithstanding the objections urged by the defendant, the plaintiff has the right to sue for the proportion of the damages sustained by him; and that, as there has been a breach of the covenant declared upon, the plaintiff is entitled to our judgment upon the facts found in this special verdict.

Judgment for the plaintiff (*c*).

(*b*) 12 Ea. 464.

(*c*) As the judgment of Lord *Brougham*, C., in *Clayton* v. *Earl Grey and others* (referred to, *ante*, p. 305), has not been reported, and as it bears materially upon the present case, it will probably not be unacceptable to the profession that the more important

portions of it should here be presented: the reporter having been kindly furnished with a printed copy by Mr. *Pope*, the attorney for the plaintiff in the principal case.

The judgment was delivered, as stated in the special verdict, on the 11th of *June*, 1834, when, after some preliminary observations upon the form and nature of the proceedings, his Lordship proceeded as follows:

"The case appears much more extensive and complicated than it really is. Various persons are found in possession of leasehold interests for years absolute, or on terms of years determinable on lives. Some of these leases have been renewed by giving additional terms, or by putting in new lives as the old ones dropped, for many generations. This has gone on for two centuries, or two centuries and a half, in some cases. The power of making such leases has been given by various Acts of Parliament, as between the lessor and the first or mesne lessee; and by settlements, or by private Acts, conferring a leasing power given in settlement, as between the mesne lessee and the tenants paravail. But when all is done, and the whole matter is examined, the result is, that there is no title whatever in any of the lessees, except the one which the lessor has given them; that the whole of their interests are confined to the lives, or the term and the lives together; and that this case is, in no one particular, distinguishable from the case of very common occurrence, where a private landlord has, from motives of kindness, allowed the same families long to farm his land; or from motives of interest, has granted long leases to encourage mining, building, or other speculations demanding great outlay of capital, and has renewed from time to time the term for such purposes originally granted. If we suppose the property leased out to have been originally in strict settlement, so that no interest beyond the estate of the tenant for life could be conveyed, and a private Act of Parliament was requisite to sanction and validate the lease for years, or *pour autre vie*, the case will come so near the present, as not to be distinguishable from it even in form and appearance; but in substance and principle the case is exactly the same with that of a private person, or a succession of persons, enabled, by the powers of successive settlements, to grant leases under certain restrictions, and exercising those powers in such a way as seldom to make any change in the lessees, so long as they performed their covenants, and continued to cultivate, to mine, or to build.

"A pretence, for it amounted to nothing more, has been occasionally introduced into this case, as if the lessees were copyholders or customary tenants of some manor, and had, like the tenants of the northern manors upon the *Scotch* border, in *Cumberland* or *Northumberland*, a perpetual right of renewal by the custom. In other copyholds the estate of the tenant is an estate at the will of the lord; but that will is defined by the custom of the manor; so that, as long as the tenant does nothing to incur a forfeiture, the interest which he has in his tenement is as fixed, indefeasible, and independent, as the estate of the lord himself, being an estate at will only in name. In the tenant-right manors, as they are called, of the northern border, the form of holding is different; while in substance the nature of the estate is the same, being as fixed, indefeasible, and independent as the lord's. Instead of an estate at the will of the lord, according to the custom, it is an estate for the joint lives of lord and tenant; a leasehold, as it were, for their joint lives, but with an absolute right of renewal upon certain fixed terms, as a fine of so many customary rents, or what is called an arbitrary fine, long since restricted to two years' improved rent. Upon paying this, and doing the other services, the customary heir of the tenant (who is the same heir as succeeds to the crown, the right of coparceners being excluded), renews on his predecessor's death; and, on payment of the like fine, he renews on the lord's death; so that a lease for their joint lives is always kept up at a fixed rent which never varies, and is kept up by renewal at a fine not fixed, but never exceeding a fixed proportion of the improved yearly value. The estates of these tenants, therefore, is, in every material respect, similar to that of ordinary copyholders, where the rent and services are fixed and invariable, and there is a fine not exceeding two years' improved rent payable on the death of the tenant and the lord:—sometimes on the death of one only, sometimes on the death of both, and also on alienation. I enter into these particulars, because I am well aware that an obscure and vague notion of an analogy to the case of these northern lessees has been engendered, has extended itself to *Cornwall* and elsewhere, and has, I believe, been a

principal cause of the present litigation.

"That originally those estates were very different, is undeniable. They were far more feeble in all respects. At first, indeed, they were the most feeble of all, being mere estates at the will of the lord, and the tenants being his villeins, serfs, and bondsmen, most anciently the chattel property of the lord, and not fixed to the soil at all; afterwards, astricted to the soil, but still the lord's property, and passing with the soil to a purchaser, though no longer liable to be removed. It is probable, that after they ceased to be astricted they were liable to be removed, and their tenure to be determined at the lord's will; and, in those border manors where the tenure assumed the form of leasehold for lives, there can be no doubt that, at one time, the right of renewal belonged, not to the tenant, but that he was liable to be displaced at the lord's pleasure. The learning upon this subject is laid open to the student, and indeed to the lawyer, in a most able treatise of Mr. Justice *Blackstone*. The steps by which the change was effected, both in copyholds generally and in the particular class of tenant-right manors, is like all the changes which are effected by the slow operation of time and the progress of society, without any convulsion, and without even any legislative interposition, involved in an obscurity which we seek in vain to pierce. Some disputes that arose on the northern border in *James* the First's time, gave rise to an arbitration, and the history of that transaction leads to the belief that, even in these comparatively recent days, the tenant's estate was not considered as finally established. But this much, I think, we may venture to affirm, that all those rights were, in far more distant times, in somewhat of the predicament in which the present claimants of renewal are now placed; that all of them passed through a stage of this kind; and that the tenants everywhere obtained, by sufferance or usurpation, their indefeasible rights, as against the lords, by succeeding in a contention, of a description similar to that now urged by the tenants of the duchy: a contention more silent and less formal, indeed, but in its nature and object the same. If the lords in those remote times had chosen to resist, as the owners of the duchy now do, the fixed estates, at present and for ages past enjoyed by copyholders, never could have been obtained by them; and the duchy tenants have now to shew by what title they claim any estates beyond what the leases they hold by contain and convey. All pretence that they have attained the state of copyhold or customary tenants is out of the question. Let us see, then, whether they have any other claim to renewal or continuance.

"It is undeniable that the property of the duchy may, like that of any other body or any individual, be so administered as to create rights, against which those who may have suffered them to be established will in vain struggle. If any lessor so treats his tenant as to make him believe that he will renew his term; if, on a faith so induced, the tenant expends his money, or in any other way becomes a loser, the lessor will be compelled to give him such renewal as his own conduct may have led the tenant to reckon upon; especially if the thing done by the tenant in any way redounds to the advantage of the lord. The cases cited in the reply for the plaintiff; (*Lloyd* v. *Buckland*, 2 Freem., and *Allen* v. *Bore*, 3 Bro. C. C.), would prove this, were an authority to demonstrate so plain a proposition wanting; and those cases prove nothing more. They are far, indeed, from shewing that the expectations which the tenant may have formed, even if he shall have acted upon them, and acted upon them for the benefit of the lessor, give the tenant any title to a renewal, unless those expectations shall have been created by the assurances, the hints, or other conduct of the lessor himself. They are as far from shewing that the lessor can, by any conduct of his, create a right of renewal beyond his own title in, and power over the property, which is the subject of the transactions between the parties. But in both these particulars the present case differs from those cited, and in both of these respects does the doctrine to be extracted from such cases fail to include and to support the contention of the present plaintiff. *There has been nothing done by the duchy to excite the expectations and mislead the tenants into expenditure, and there exists no power of perpetual renewal by any portion of the title, that I can perceive to be in the duchy.*

"The duchy of *Cornwall*, as is well known, was created by *Edward* III. for the Black Prince, in the 11th year of his reign, by a charter made in Parliament, and having the force of a Statute, as was solemnly adjudged in the Prince's case, reported by Lord *Coke*, in the Eighth Report. The

species of succession is of a singular nature, and from thence has arisen no small portion of the controversy which now is in agitation before us. The duchy vests in the King's eldest son and heir apparent to the Crown, at the instant of his birth, and without gift or creation; it vests in him, too, according to the sounder opinion, as if he were of full age at his birth, and as if minority could no more be predicated of him than of the Sovereign himself. Lord *Coke*, indeed, by a mistake not easily explained, unless we refer it to the Eighth Report being published after that great man's death, and with the inaccuracy incident to posthumous works (b), has said that only the first-born son takes the duchy; and that, on his decease without issue, the second or other son cannot succeed; but this has been fully refuted by Lord *Hardwicke* (in *Lomax* v. *Holenden*, 1 Vesey, 295), who refers to the authority of *Selden*, and also to the known fact of *Henry* VIII. being duke of *Cornwall* after his brother Prince *Arthur's* death; and to *Charles* I. (then Prince *Charles*), having held the duchy after Prince *Henry's* death (c). Yet still the shifting of the

(b) The 8th part of *Coke's Reports* was published 9 J. 1; A. D. 1611. The learned author did not die till 1634.

(c) See the note by Christian to 1 Bl. Com. 224. It is observable that, in the original parliamentary charter, 11 E. 3 (of which several portions are cited in Latin by *Coke*, in the *Prince's Case*, and a translation of the whole is given in the Appendix to *Rowe* v. *Brenton*, 3 M. & R. 474), the duchy is granted to the *Black Prince*, "to have and to hold to the said duke, and to the first begotten sons of him and his heirs, Kings of *England*, (such sons) being dukes of the said place, and heirs apparent to the said kingdom of *England*," 3 M. & R. 478. (*Habendum et tenendum eidem duci, et ipsius et hæredum suorum regum* Angliæ, *filiis primogenitis, et dicti loci ducibus, in regno* Angliæ, *hæreditarie successuris;* 8 Rep. 16, b); but the subsequent "clause of revivification," as *Coke* calls it, is as follows: "so also as that whenever the said duke, or other dukes of the same place, shall depart this life, *and a son* or sons *to whom the said duchy by virtue of our grants is appointed to belong, shall not then appear*, the same duchy, with the castles, &c., to us, and our heirs, kings of *England*, shall revert, to be retained in our hands, and in the hands of our heirs, kings of *England, until such son* or sons, *heir* or heirs *apparent to the said kingdom of* England *shall appear*, as before is said, to whom then successively we, for us and our heirs, grant and will that the said duchy, with the appurtenances, be delivered to be holden, as above is expressed," 3 M. & R. 482. (*Ita quod præfato duce, seu aliis ejusdem loci ducibus decedentibus, et filio, seu filiis, ad quos dictus ducatus, prætextu doni et concessionis nostrorum prædictorum, spectare dignoscitur, tunc non apparentibus · idem ducatus cum castris, &c., ad nos vel hæredes nostros, reges* Angliæ, *revertatur, in manibus nostris et ipsorum hæredum nostrorum, regum* Angliæ *retinendus, quousque de hujusmodi filio, seu filiis, in dicto regno* Angliæ *hereditarie successuris appareat, ut dictum est, quibus tunc successive ducatum illum cum pertinentiis, pro nobis et hæredibus nostris concedimus et volumus liberari, tenendum prout superius est expressum*, 8 Rep. 17, a, b). *Coke* does indeed expressly say, "neither was King *Henry* the 8th, in the lifetime of his father, after the death of the prince *Arthur*, his brother, *by force of the said creation*, duke of *Cornwall;* for, although he was the sole son and heir apparent of *Henry* the 7th, yet, forasmuch as he was not the first begotten son, he was *not within the said limitation;* for prince *Arthur* was his first begotten son:" he does not, it will be seen, deny that prince *Henry was* duke of *Cornwall*, but merely that he was so *by force of the said creation;* so that it would have been consistent with this statement if prince *Henry* had been created duke of *Cornwall* by charter; or that he held the title by usurpation, and not by right. Lord *Bacon*, however, in his history of *Henry* the 7th, as expressly asserts that, after the death of prince *Arthur*, "*Henry*, duke of *York*, was *created* prince of *Wales*, and earl of *Chester* and *Flint: for the dukedom of* Cornwall *devolved to him by Statute*," 1 Ken. 629. So with regard to *Charles* the 1st, *Selden* says (Tit. of Hon. 2, c. 5. sec. 29), "the eldest sons of our Sovereigns have been by law accounted dukes of *Cornwall* in the first instant of their birth. Neither only the eldest in respect of absolute primogeniture, but also the second, or other, after the death of the first, or former, on whom this title was so cast: as it was lately resolved, upon good and mature reason, grounded by divers authorities and precedents, for the now most noble prince *Charles*." The title of the Act of 21 J. 1, c. 29, referred to presently by Lord *Brougham*, is as follows: "An Act to enable the most excellent Prince *Charles*

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title is of a very peculiar nature, and singularly calculated to interfere with grants of leasehold interests. For if the Crown devolves upon the duke of *Cornwall*, having no son, there ceases to be a duke, and then the duchy is in the Crown; and so if the prince die. But at any moment a son may be born, and his birth divests the duchy; and the duke then holds it, subject to the double contingency of his own and his father's death. Originally, therefore, no acts done either by the Crown or the duke could give any permanent leasehold interests to the tenant; yet it so happened that much, indeed most of the duchy property, was of a kind that required the outlay of capital; as mines in *Cornwall*, or building land in or near *London*. Some powers were therefore necessary in order that the estate might be well administered, whether in the hands of the prince or the Crown. Accordingly, as early as the 21 Jac. 1 c. 29, when the necessity began to be felt, an Act was passed, reciting that the peculiar form of the limitation by which the duchy is holden, had raised doubts as to the endurance of the leases granted by the duke, and stating the expediency of enabling him to grant such 'leases as shall make the tenants sure to have good estates and so to be encouraged to bestow charges on the building and maintaining of their houses and manuring their lands;' and enacting that all leases granted by the prince should be good, not for ever, nor with any right of renewal, but provided expressly that they exceeded not three lives, or thirty-one years, determinable on three lives. A similar Act was made on the prince's accession in 1625, 1 Car. 1, c. 2, and with the same restriction of the leasing power.

"During the civil wars no renewal under the powers of these Acts had been made; and at the restoration it was found that many leases had expired, or were about to expire, the former Act confining the power to three years, and twenty having elapsed; therefore, the 13th Charles 2, c. 4, was passed, upon a recital of this circumstance, and a statement that the tenantry had laid out money to the advantage of the public, and that but for a renewal, which by law could not now be made, the terms would expire. The words of the legislature go no further than to declare that the duke shall be enabled to grant such leases, which he could not have done without that Act of Parliament. If the duke did not avail himself of the powers of the Act to renew the leases, the leases were gone; so says the Act, and that is all which it says; and yet we hear it said that this Act has misled people, and made them believe they had perpetual interests. I am bewildered by such an argument, raised upon such an Act; and my comfort is, that I am not the only person bewildered. I think they who maintain this case on such grounds are likewise bewildered by it. The Act gave the Crown (there being then no duke), the power of renewal during three years, and provided that no longer term than thirty-one years and three lives was granted. Surely nothing can be more inconsistent with the idea of these tenants having at that time any right of renewal, than this recital that the leases were about to expire, and the enactment that they should only be renewed for a certain period, as plainly defined as any words could specify or limit.

"In the 22d of the same reign was passed another Act, reciting that the rents had been of late years raised, and that complaints were made of the increase, and it both confirms leases granted, which do not exceed the period limited by the former Acts, and gives leave to compound with the duchy officers for restoring the old rent; but it expressly states that this leave is in consequence of the King having been 'graciously pleased to allow of the composition upon the complaint made to him;' that is, not a matter by right extorted; it is a matter of favour, a matter of concession. The same leave to compound is renewed, and in terms 'by the King's grace;' in the same terms, three years after, by 25 Charles 2, c. 3; and again in 1685, by 1 James 2, c. 9.

"In the reign of *George* II. another Act on the same principles was passed, giving the Crown the like powers of leasing for thirty-one years and three lives; in order, says the preamble, 'that the minds of the lessees may be

to make leases of lands, *parcel of his Highness's duchy of Cornwall*, or annexed to the same." It appears that *Henry* the 6th, in the 33d year of his reign, *created* his son *Edward*, duke of *Cornwall*, although he was so previously by birth; probably, as suggested by Mr. *Manning*, with reference to the claim then advanced to the *succession* to the Crown, on the part of *Richard*, duke of *York*; Mann. Exch. Prac. Rev. Br. 377, 393, 4.

eased and quieted, and that such as may take leases may be sure to have good and indefeasible estates, and be encouraged to lay out money in building.' The same recital occurs in the subsequent Acts passed the 33d of George 2, and the 1st of George 3; 33d of George 3; 7th & 8th of George 4; and 1st & 2d of his present Majesty.

"The power in these Acts is given for seven years, and much reliance is placed on the words 'good and indefeasible estates,' as if a lease for thirty-one years, determinable on three lives, were not 'a good and indefeasible estate' for years or for lives, compared with a lease for such term, or such lives, liable, at any minute, to be disaffirmed at the lessor's death, by his successor. It really seems to be assumed in the argument that an estate for years is not 'an estate good and indefeasible,' and that no estate can answer this description which is less than a perpetuity.

"But let us only look at the enacting part of the Statute.

"It does not give any such perpetual right; it says not one word of renewal; it merely enacts that all leases made for thirty-one years, determinable on not more than three lives, or leases made for not more than three lives, 'shall be good and effectual in law, according to the purport and content of the same,' against all who shall hold or inherit the duchy. Surely nothing can be more manifest than that, instead of giving any interest whatever beyond the lease actually granted, and which must not exceed the limited period, this enactment only makes all leasehold interests not exceeding that period 'good and indefeasible' for that period and no longer, against the holders, or heirs of the duchy. To contend that the use of these words gives any right to the lessee beyond the term in the lease, is quite contrary, both to the plain intendment of the preamble, and the obvious force and effect of the enactment and proviso. As well might it be contended, that a lease from *A.* to *B.* in these words, 'to hold for thirty-one years indefeasibly, but no longer than thirty-one years,' would give him a right against *A.* to have another thirty-one years added when the first expired, and so on for ever: in other words, that a 'good and indefeasible' term of years is equivalent to a good and indefeasible estate in fee simple; or, at least, to a good and indefeasible lease in perpetuity at a fixed rent.

"The expressions used in the Acts previously quoted, of 'good estates,' in 21 James 1, and 'fixed estates,' in the 13 & 14 Charles, are not so much relied on; but are subject to the same remark. Those Acts enabled the Crown to grant 'good' and 'fixed' estates, but only for years and lives. They were 'good' compared with the bad estates; and 'fixed,' compared with the uncertain and frail estates, which, but for the power of those Acts, were all the Crown or the duchy could give; for without these powers, no lease for a year, or a month, or a week, could have been good and fixed, but only for the life of the lessor, and not even for that, since the peculiar tenure by which the duchy was holden, exposed the lessee to other casualties besides the lessor's death.

"It was afterwards deemed expedient, indeed, it probably was found necessary, to give some extension of the leasing power, for the purpose of encouraging builders. As early as 1777, by letters patent, the Duke of *Cornwall* (his late Majesty George 3), had granted to the *Clayton* family a lease for ninety-nine years: but as the enabling Acts then in force only give a power of leasing for three lives, these letters patent would not have been valid had not three lives also been added as a qualification. This was accordingly done, though it is contended, from the frame of this grant, and the circumstances of it, that it was intended to be renewed as the lives dropped. This is only part of the general question now before us, there being nothing in the patent to carry the term beyond the lives of the three *cestuique vies* mentioned, and nothing whatever of renewal referred to; there being also an absolute want of all power to grant such a lease, as is contended for, at that time to any person, on any consideration.

"Under these letters patent, the lessees took, held and built. But, in 1793, it was deemed advisable to enlarge the leasing power; and by the Act then passed, upon a recital that various applications for building leases had been made, and that the parties could not undertake such operations if they had only terms of thirty-one years or three lives, the duchy was expressly empowered to grant leases for the absolute term of ninety-nine years on improved annual ground rents.

"This Act, from the beginning to the end, says nothing of renewal; but it is equally silent as to the leases already granted for ninety-nine years, determin-

able upon three lives. It is said, indeed, to confirm those leases 'made' as well as those 'to be made;' but if we were to admit that it confirms all of them by the use of these words, they occur in the *first* section, before a single word had been said of the expediency of granting leases for ninety-nine years absolute; and it confirms them expressly 'according to the purport and contents of the said leases and grants;' so that, supposing the words 'made or to be made' extend backwards to grants already in existence, and, among others, to the letters patent of 1777, these are only validated 'according to their purport and contents,' which, of course, gives the parties in this case ninety-nine years, determinable on three lives, without any right of renewal.

"That these Statutes, then, neither by the recitals of their preamble, nor by their enactments, give the least right beyond the mere terms of the demise, is clear past all doubt. But it is said that this mode of dealing with the property, and this way of adverting to the estate granted to the lessee, was calculated to deceive the tenants, and make them lay out their money on the premises; and it is added, that the inducing them to do so is avowed as the object in view of the legislature.

"This misleading of the lessee by the lessor and the Parliament together, (for we are not very distinctly told who it was that practised the deception) consists, therefore, of three things—the phraseology of the preambles; the substance of the enactments; and the motive avowed.—Now, I think, it may safely be laid down as a rule to govern this kind of question, that a party has no right to charge another with the consequences of his own grossly mistaking, and even wilfully mistaking the sense of words used; when such person employs a word in one sense, and for one purpose, which, had he used it in company with other expressions, and plainly with a different view, would have borne a very different meaning. No one has a right to run away with a word, and by merely crying out, in a senseless manner, 'you said *estate*,' or 'you said *indefeasible*,' or 'you said *fixed*,' justify himself for forming expectations that the other party intended something more than a gift of the particular quantity of interest specifically described, with certainty to that fixed amount, and indefeasibly to that amount. There is nothing at all obscure or ambiguous in the words. An indefeasible estate for three lives means, as plainly as words can speak, an estate for three lives, happen what will to the grantor of the estate, and be who may the owner of the fee during those three lives; nor can any one be deceived by these words into a belief that more is meant to be given, unless he wilfully deceives himself, by taking the words in a sense which does not belong to them, and in which no other man employs them.

"If the preamble left any thing doubtful (but which however it certainly does not), the enactment and the proviso remove that doubt; because they shew in what sense 'indefeasible' is used. As for the motive avowed, of inducing the lessee to lay out money, nothing can be less capable of misleading. Unless they were sure of their term of thirty-one years or three lives, that is, if they were liable to be turned out, not at the end of those terms respectively, but whensoever the lessor died, or became king, or had a son, they would, of course, lay out no money, because, though the lease purported to be for thirty-one years or three lives, it was, in reality, not even for one life; but was determinable by the death of the lessor, and by other contingencies.

"I have hitherto, of purpose, stated the argument raised for the plaintiff wholly upon grounds which must be common to all the lessees of the duchy; because, after all, the case for him rests entirely, and the answer to that case mainly, at least adequately and satisfactorily, may be made to repose, upon the examination of those general grounds without resorting to any thing peculiar in the *Clayton* grant. Nevertheless, I cannot shut my eyes to some special circumstances, which deprive those who now maintain this contention of any shadow of claim, built upon a supposed understanding, or a fancied deception practised upon them.

"I pass over the letter in *October*, 1831, of Mr. *Wicken* to the Surveyor-General of the duchy; the expressions of which are the very *reverse* of any thing like an indication of the parties whom he represented being conscious of *a right*. I likewise pass over the kindred and similar expressions of the plaintiff himself in his letter of *December*, in the same year. These I pass over, not from any disposition to underrate the importance of their bearing upon the argument, but because they relate not to the early period of the time in which an understanding is said to have grown up, and been encouraged

by the lessor. But the petition presented in *March*, 1777, when the letters patent for ninety-nine years determinable on three lives were granted, is not subject to the same objection; and the occasion on which it was preferred, the renewal of the term, clothes this petition with great importance. After stating that this term of thirty-one years granted in 1747, would expire in 1778, and that the reversionary term of eighteen years expectant upon that first term would then be vested in possession, the petitioner goes on to represent that the premises, from their situation, would be much more improvable than at present, and would be of considerably more advantage both to him and the Crown in future (it was during the duke's minority), if 'such a term were granted as would enable him to let upon building leases, from which he had hitherto been restrained by having had no longer term vested in him than thirty-one years, both in possession and reversion.' He then refers to the Crown's and the duke's power to grant leases, not only for thirty-one years, but also for any term determinable on one, two, or three lives; and *his prayer is, to be allowed to surrender his present interest*, (that is, the residue of thirty-one years in possession, and the whole expectancy of the eighteen years in reversion), *and to have a new lease granted to him. Now, does he ask for it absolutely?* No! The words are for ninety-nine years, '*if such three lives as he shall name, or either of them, shall so long live.*' He now says that he *got that which he never asked;* and *one meaning*, it seems, is to be given *to the words used in the petition*, and *another meaning* to be given *to the same words used by the Crown in acceding to that petition.*

"THIS is really DECISIVE, and disposes of the whole question with the present plaintiff. For, *first*, it *proves that he did make* and *could make no claim of right whatever, beyond the term then in being;* and *that he could pretend to no right of renewal whatever.* If he could, if he had not only eighteen years absolute in reversion, but a right to renew, then he could have had no difficulty in granting sub-leases with covenants to add the renewed term to the term granted by those sub-leases. But he distinctly *states* that he can do nothing of the kind; *that he has no more than an estate for years*, which must expire in nineteen years; and that he must, therefore, resort to his lessor to give him a better estate in lieu of it, and one which will last longer. But *secondly*, in having this recourse, and in this admitted necessity, he expressly states the Crown's power with its restrictions, and *only asks to have ninety-nine years, if those lives, whom he is to name, shall so long last.* Nothing can be more distinct than his admission that the Crown could grant no more, unless, perhaps, it be the cognate admission, that he had no idea of asking any more, and confined his whole prayer to ninety-nine years, determinable on three lives. He does so confine his prayer; he asks this, and he asks no more. It is granted: can he now complain that he has got all he asked? Can he now be heard to say that he got, not ninety-nine years determinable, but ninety-nine years absolute; or that he has a *right* to put in lives when his nominees die; or that he thought all the while that the duchy lessees had 'good and indefeasible' estates beyond the terms in their leases; that they could not be ousted; that they were as much independent owners as the lessor; and that the only difference between these two estates was the obligation to pay a small fixed rent? NOTHING CAN BE MORE PREPOSTEROUS THAN SUCH A CONTENTION, AND NOTHING MORE FATAL TO IT, THAN THE BARE STATEMENT, AND THE PRAYER OF THE PETITION.

"As for the Act enabling the *Clayton* family to grant leases, and the mortgage by them to Sir *Robert Taylor*, in 1778, of the lease in question, for 6,000*l.*, these plainly cannot carry this case one step further. The private Act only affects the rights, interests, and equities of the members of the family in regard of the settlement; and least of all can any inference be drawn from their pledging the lease. The term, without any right of renewal, might be, for aught we know, sufficient security for 6,000*l.*; but if not, they might pledge whatever right of renewal they had, or might be able to prove they had; and if they had no right, they might consent to give their mortgagee the benefit of such renewal as in any way they should obtain. But all this is inapplicable to the present purpose in any manner, for no transaction between the lessee of the duchy and any third party, behind the back of the duchy, can ever affect its rights. The utmost that can be gathered from any such dealings, how clear and unequivocal soever, is, that they evince an expectation, or belief, or confidence, on the part of the lessees, that they were

to have a renewal. But this proves just nothing at all, unless it is further shewn that this expectation was created by the duchy.

"Let us now consider in what respect this case differs from so many of daily occurrence, and what claim the duchy lessees can make to renewal, or to continuance of their terms, which would not be open to the tenants of any other estates, which have been accustomed to be farmed or built on, or worked in mines by the same lessees or their families for a long course of years. I profess, with all the attention I have been able to give the subject, that I can find no difference whereon to abide, or whereon to raise a distinction.

"Suppose a great landowner in the country, or the proprietor of an estate built upon in *London*, has succeeded to his ancestors, under whom farms have been occupied from fourteen years to fourteen years for many generations, or houses built on forty-nine years' leases, renewed from time to time on fines, and paying a ground rent, without allowing the lease to expire during a century or a century and a half. Nothing can be more common in *London* than such constant renewals; it is not unknown, even in agricultural holdings, without any leases; for, in some parts of the country, where leases are uncommon, the same farmers have continued (and they are often not the best of farmers), to occupy under the same landowner for ages, and merely at will. But in *London*, the practice in almost every case is, not to let the lease expire: and here, therefore, the circumstances I am supposing are of constant occurrence. To make the parallel between the cases more exact, suppose the estate in question to have been in strict settlement, as it easily may be, for ages, and that as often as a recovery was suffered, or a fine levied, new uses were so declared as to re-settle it upon a succession of mere tenants for life, but always with powers of leasing. Suppose that the same power were always given of granting a lease not exceeding thirty-one years or three lives, and the settlement creating the power contained a preamble also included in each lease, that 'it was expedient for encouraging good husbandry, for increasing mining speculations, and for engaging the lessees to expend their money in building, that a power should be given of granting good and indefeasible estates, according to the purport of the leases under such power.' Suppose that in the faith, as they might say, but in the expectation, or the hope, as it would be more correct to say, of renewals, the lessees had granted sub-leases to under tenants for a period extending beyond their own apparent interest, as shewn on the face of their leases, and rather for a period according with their hopes and expectations, or say their claims and pretensions, than with their clear and undoubted title; and suppose further, that they had mortgaged the leases for more than they could well carry, unless the renewal was certain, although to such mortgage the landlord in the country, or ground landlord in *London*, was neither party nor privy. Now the case I have put would give every one of those lessees pretending to have the right of renewal, the same claim against his landlord, the same indefeasible estate in his farm or his houses, which the tenants of the duchy of *Cornwall* are here setting up. For there is all the same combination of circumstances in the case I have supposed as in the case at Bar. We have the long possession and constant renewal; the dealing on both sides with the property uniformly and in a manner consistent with the existence of right; the publicity of the power to lease given in the settlement. The words in which the grounds of granting that power are couched are, that the tenants may have good and indefeasible estates, the reason for granting such estates is, that they may be encouraged to lay out their money on the property. The distinct statement of these expressions to the tenants in their leases is, indeed, much stronger, and brings it more home to them, and comes more directly from the lessor, than all the duchy Acts of Parliament together can be said to give notice to the duchy lessees. Last of all, we have the dealing by the lessees on the faith of having such interest and such right of perpetual renewal, by expending money, by granting long sub-leases, and by heavily mortgaging. All this makes the case put as strong, nay, much stronger, for the tenants of Lord *Fitzwilliam*, in *Yorkshire*, and of Lord *Westminster*, in *Middlesex*; and yet all this amounts to so absolute a nullity as an argument, or even the shadow of an argument, to prove that the tenants can renew at pleasure, and that the landlords have no right to determine their leases, and take the estate into their own hands, and let it out to new tenants as the terms fall in, that there is no conveyancer, no common or equity

lawyer, no solicitor of a year's standing, no student of a year's reading, who would ever dream of counselling any one of those tenants to prefer any thing wearing the semblance of a claim to renewal as a right, or to offer the shadow of remonstrance, or to mutter even a threat of stirring the question, when served with a notice to quit. Nay, I will venture to say that there is not one of those tenants themselves, the most obstinate and litigious and insolent that the metropolitan, or the most rude and ignorant that the remoter province can produce, on either the *Grosvenor* or *Wentworth* estates, whose ignorance and presumption, or whose dulness and inexperience of legal matters, would ever lead him to fancy a right as against his landlord, or push him to menace the slightest resistance to his absolute right of granting or refusing a renewal of the expiring lease.

"Those cases are no way distinguishable from the present; but there is one, if it be possible, still more directly parallel, and of daily occurrence—church property and college estates are almost always let on fine and renewal; that is, for twenty-one years, renewable every seven years on a fine; and such estates have, in most instances, been for ages in the same holding. The lease is hardly ever suffered to expire. Those leaseholds, sometimes called chapter-lands and college-hold property, go from father to son, are sold, mortgaged, settled, unsettled, re-settled, in short, made the subject of dealings in the market, and at law, and in equity, as if they were of freehold or copyhold tenure. There is none of the tenants that could not raise fully stronger cases of claim than any which the duchy tenants can set up. Yet who ever heard of such a contention being brought forward, or indeed entertained, or ventilated, or even whispered at a farmer's meeting? It generally suits the individuals who compose those corporate bodies, and are persons somewhat of an advanced age, to renew rather than to let the terms expire, and, therefore, they rarely exercise their right of determining the leases. But this is far from being always the case. In some chapters, from time to time, the opposite course has been taken, and in many colleges, of late years, it has been pursued. The Fellows have allowed the last fourteen years to run out, foregoing the benefit of the fine, in order to obtain, at the expiration of the lease, the whole property discharged of the term, and either to change their tenants altogether, or to occupy it themselves.

"It is very certain that there never has yet occurred an instance of this right being resisted, or, in any manner of way, disputed, or cavilled at, or doubted; and men who doubt all other rights as connected with this little favoured species of property, never yet have been ignorant enough or hardy enough to question this; nor will they, as long as the law of the land remains unchanged, and the rights of private property are held sacred. But if the duchy tenants are right, then no chapter and no college can henceforth suffer a lease to expire. All are bound to renew at the tenant's good pleasure; in other words, here, as in the case before put, of the *Yorkshire* landlord, the proprietor and his tenants, and the lessor and lessee change places, and the owner, dispossessed by mere efflux of time, by long endurance of the occupation, by expectations engendered without his aid, by hopes which he has done nothing to raise, is stripped of his estate, and becomes a dependant upon his lessees.

"That which, in all other cases, has been thought to strengthen a landlord's title, the long payment of rent, destroys this title; that which has hitherto been held to preclude a party from disputing another's right, namely, the long subsisting relation of landlord and tenant between them, here clothes the tenant with the power of defeating his landlord; that which, in the times that are passed, was wont to be regarded as the confirmation and assurance of the lord's estate, the long acknowledgment by the tenant of his lord's title, now operates its extinction, and transfers the lordship to the tenant.

"It is said that this is not merely the case of the *Clayton* family, but of many other mesne lessees, and that it concerns not only the interests of the tenants paravail on that estate, but hundreds of others; in a word, that it is the case of all the tenants mesne or paravail of all the duchy of *Cornwall*. I fully accede to this proposition, only I carry it further: for it is not merely the case of this duchy, but of many others; the duchy of *Portland*, and *Bedford*, and *Devon*, and *Cleveland*, and *Sutherland*, and *Rutland*; and it is not only the case of those ample domains, but of all other proprietors, great and small, and their tenants. It is the case of every one estate in the towns and in the counties where the land has been leased for a length of

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time, and the terms have not been suffered to expire. There is nothing to distinguish the case of the King, or his eldest son, the prince, and their tenants, from that of all other landlords throughout the realm. Were I to give judgment now against the Crown, I should make every title throughout the kingdom shake, and conjure up a frightful group, a host of dark and fantastic suitors, to blacken this Hall, and fill its air with novel and discordant sounds, uncouth to all learned ears, unintelligible to all learned minds, and involve the community, and all its real property, in a maze of groundless, endless, pitiless litigation."

June 7.

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P. S. devised an estate to his executors, to the use of *J. S.* for life; with a power to them to mortgage, and a proviso that the person entitled to the rents and profits might lease for twenty-one years. In 1812, after the testator's death, *J. S.* (the tenant for life.) demised to *T. C.* for ninety-nine years, if he (*J. S.*), should so long live; in 1814, he demised (under the power), to the defendant for twenty-one years; and in 1828, the surviving executor mortgaged to the plaintiff (also under the power), for 1000 years:—*Held, first*, that the leasing power of the tenant for life was not destroyed by the lease of 1812; *secondly*, that such power was not suspended, as against the mortgagee, under the mortgage of 1828; and, *thirdly*, that in an action by such mortgagee, as reversioner, against the lessee, under the demise of 1814, for breach of farming covenants, the defendant could not set up the interest of *T. C.* under the demise of 1812.

COVENANT. The declaration stated that *Peter Sers*, deceased, being seised in his demesne as of fee, of the messuage and lands, &c., thereinafter mentioned to have been appointed and demised to the defendant, by his will devised the same to *Maples* and *Brown* (his executors), and their heirs, to the use of the testator's son, *James Sers*, *for life*, *with power* to the said executors *to raise money by mortgage* of his real estate, in fee or for years, and a proviso that it should be lawful for *the person entitled to the rents and profits for the time being*, and, during the minority of such person, for the said executors, *to lease* the premises in manner therein prescribed, at a rack-rent, *for any term not exceeding twenty-one years*, to take effect in possession; that *P. S.* died seised of the messuage, &c., in *November*, 1811; that *M.* and *B.* proved the will, and that *M.* died in *June*, 1822; that *J. S.*, *being entitled*, under the limitations in the will, *to the rents and profits* of the premises hereinafter mentioned to have been demised to the defendant, being part of the premises in the will mentioned, afterwards and after he came of age, to wit, on the 31st *December*, 1814, by an indenture between the said *J. S.*, of the one part, and the defendant, of the other part, in exercise of the power given him by the will of *P. S.*, and by virtue and in exercise of all other powers enabling him in that behalf, did, by way of demise or lease, limit and appoint, and, by way of further assurance, *did grant*, *demise*, *and lease*, *to the defendant*, his executors, &c., the said messuage and lands from the 11th of *October* then last past, *for twenty-one years* thence next ensuing, at the rent of 1,500*l.* a year, and the further yearly rent of 10*l.* for every acre ploughed up or managed contrary to the covenants in the indenture. The declaration then contained covenants by the defendant for payment of rent; and for good husbandry, and stated that the defendant entered by virtue of the indenture; that the demise determined on the 11th of *October*, 1835; that, after the death of *M.*, and during the term granted as aforesaid, by an indenture of mortgage of the 14th of *June*, 1828, between *B.* of the first part, *J. S.*, of the second part, and the plaintiff, of the third part, *B.* did, by virtue of the power in the will of *P. S.*, bargain, sell, and demise, and *J. S. granted*, *demised*, *and confirmed to the plaintiff*, his executors, &c., the said messuage and lands, to hold the same to the plaintiff, his executors, &c., from the day before the date of that indenture

for the term of 1000 *years*, at the yearly rent of a peppercorn, if demanded; *subject to a proviso for redeeming the mortgage*, on payment of 5666*l.* 15*s.* 8*d.*, with interest; that the plaintiff thereby became entitled to the reversion of the premises demised, as aforesaid, for the term of twenty-one years by the first mentioned indenture, and continued so until the 8th of *May*, 1835; that the defendant, between the 14th of *June*, 1828, and the 8th of *May*, 1835, managed and cultivated the land in an unhusbandlike manner, and became liable to pay the further rent of 2000*l.* a year at the rent of 10*l.* an acre for each acre so managed as aforesaid: *breach*, non-payment.

Third plea, that, before the making of the indenture in the declaration first mentioned, to wit, on the 7th of *May*, 1812, by an indenture then made between *J. S.*, of the first part, *George Hillyard*, of the second part, *Thomas Clement*, of the third part, and *George Hillyard King*, of the fourth part; *J. S.*, for the consideration therein mentioned, demised the messuage, &c., described in the indenture in the declaration first mentioned, to *T. C.*, his executors, &c., for ninety-nine years from the 6th of *May*, 1812, if *J. S.* should so long live; and that at the time of making the indenture in the declaration secondly above mentioned, *J. S.* was alive, and the term granted to *T. C.* undetermined.

Replication: stating the power given by the will of *P. S.* to *M.* and *B.*, or the survivor, his executors, &c., to raise money by mortgage of the messuage, &c., in question, for payment of the debts of *P. S.*; that, after the making of the indenture of appointment and demise to the defendant, in the declaration mentioned, and after the death of *M.*, the personal estate of *P. S.* not being sufficient to discharge his debts, *B.*, on the 14th of *June*, 1828, *by virtue of the power given him*, raised the sum of 5666*l.* 15*s.* 8*d.*, by mortgage of the messuage, &c.; and, for that purpose, with the privity of *J. S.*, demised them to the plaintiff for 1000 years, at a peppercorn rent, subject to a proviso for redemption on payment of principal and interest at a day now passed. *Averment*, that the sum of 5666*l.* 15*s.* 8*d.* remained unpaid, by means whereof the plaintiff was entitled to the reversion of the premises expectant upon the determination of the term granted to the defendant. *Demurrer* and *joinder*.

The case was argued by

W. H. Watson, for the defendant.—By the testator's will *James Sers* took an estate for life in the premises in question, with a power to lease for twenty-one years; and the executors had also a power to mortgage the premises, to raise money for the payment of the testator's debts; in 1812 *James Sers* demises for a term of ninety-nine years, if he should so long live, to *Clements*; in 1814, he grants a lease for twenty-one years to the defendant; and in 1828, *Brown*, the surviving executor, mortgages the premises for 1000 years to the plaintiff; this is the order of the different demises in point of date; but in priority of law, they stand thus: first, the mortgage of 1828 to the plaintiff; secondly, the demise of 1812, to *Clements*; thirdly, the demise of 1814, to the defendant; and fourthly, comes *James Sers's* life estate. For it may be conceded, that the mortgage of 1828 by the executor, being in execution of the power, is valid; but the lease by *James Sers*, of 1814, for twenty-one years, though ostensibly in execution of the power, is not valid, inasmuch as, by the prior lease of 1812, for ninety-nine years, he had suspended his power

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of leasing, *Yelland* v. *Ficlis* (*a*), *Corker* v. *Ennys* (*b*), *Vincent* v. *Ennys* (*b*), and therefore, the lease to the defendant in 1814, would take effect only by way of estoppel, as between him and *J. S.*; and the plaintiff could not treat it as a subsistent lease, and consequently, had no reversion in respect thereof. It may be urged, on the other side, that it is the practice of modern conveyancers to introduce a covenant on the part of the termor, to allow the tenant for life to exercise the leasing power, but that is done to obviate the inconvenience occasioned by a suspension of the leasing power, when a tenant for life creates a term by way of security (*c*), *Long* v. *Rankin* (*d*).

The lease of 1814 was moreover inoperative, as not having been made by "the person entitled to the rents and profits for the time being," pursuant to the terms of the will; for in that year, *T. C.* was entitled to the rents and profits, under the demise of 1812, and therefore, the lease of 1814 could not take effect in possession, *Doe*, dem. *Brune* v. *Prideaux* (*e*), *Shaw* v. *Summers* (*f*), *Williams* v. *Bosanquet* (*g*); for *Reg.* v. *Bulkeley* (*h*), and *Eaton* v. *Jacques* (*i*), must be considered as overruled by these cases (*j*).

Coote, for the plaintiff.—The general position contended for on the other side is, that if a tenant for life, with a leasing power, creates a term, such power is thereby suspended during the term; the position submitted on the part of the plaintiff is, that if a tenant for life, with a leasing power, creates a term *by way of mortgage*, he does not thereby suspend his power of leasing. Hence it follows that the different demises in this case have the following priority in law: first, the lease of 1814 to the defendant, executed by *J. S.* in pursuance of the power; secondly, the mortgage of 1828, from *B.* to the defendant, also in pursuance of the power; and thirdly, the demise of 1812 to *T. C.* for ninety-nine years; for the term of 1812 took effect out of *J. S.*'s life estate, which arises subsequently to the will, and did not, therefore, affect his leasing power; and the lease of 1814, being granted under the power in the testator's will, takes effect in the same manner as if it had been created by that instrument; by a parity of reason, the mortgage term of 1828, has also a priority to the term of 1812, which was not within the authority of the donee's power, *Whitlock's case* (*k*), and the plaintiff, as mortgagee under the former

(*a*) Moo. 788: "*Mich.*, 2 Jac. (1), *In ejectione firmæ* the case was this: a covenant to stand seised to the use of himself for life, with divers remainders over to others, some for life and some in tail, with the reversion (*qu: revcon* in orig.) in fee to himself, with a general power of revocation of all the uses in remainder. And then he made a lease for years to a stranger, and afterwards, during the term, he revoked. The question was, if he could revoke, or whether he had suspended his power of revocation by his lease during the term. *Coke*, Chief Justice, (thought) that he might revoke for all except the term: and that, if one make a conveyance with power to make leases, and with power of revocation, if he make a lease he may revoke for the residue. But the doubt here is, where he had no power to make leases, and yet made a lease. At last the Court was divided in opinion."

(*b*) Vin. Abr. *Authority* (G.) pl. 10.

(*c*) See Sugd. Pow. 54, 5th ed.

(*d*) *Ib.* Append. 716.

(*e*) 10 Ea. 158.

(*f*) 3 Moo. 196.

(*g*) 1 B. & B. 238; 3 Moo. 500.

(*h*) 1 Doug. 292.

(*i*) 2 Doug. 455.

(*j*) See also *Stone* v. *Evans*, Peake Ad. Ca. 94; Woodf. Land. and Ten. 84; *Westerdell* v. *Dale*, 7 T. R. 306 (312); *Mayor of Carlisle* v. *Blamire*, 8 Ea. 487; *Copeland* v. *Stephens*, 1 B. & Ald. 593.

(*k*) 8 Rep. 69, b. S. C. (nom. *Chappel* v. *Whitlock*), 1 Brownl. 169. See also

term, might proceed for the rents upon his reversion; *Isherwood* v. *Oldknow* (*l*).

Sir *Edward Sugden*, indeed, says (*m*), "If a tenant for life, with a power of revocation, grant a lease, rent-charge, &c., to take effect out of his interest, natural equity requires that he should not be permitted to defeat this interest;" and he cites *The Attorney General* v. *Gradyll* (*n*), which is not law (*o*); but he is obviously alluding to a contest between the first grantee of the tenant for life, and a lessee in the actual occupation of the land.

The case of *Long* v. *Rankin* has decided, that where a tenant for life, with a power of leasing, has conveyed away his life-estate, but it was *stipulated* that he might exercise his power of leasing with the consent of the grantee, the power might be legally exercised notwithstanding such conveyance; and such leasing power may be exercised, notwithstanding a grant by way of security, *Walmesley* v. *Butterworth* (*p*); and the term of 1812 being such a grant, the grantor was the person entitled to the rents and profits when he executed the lease of 1814, which consequently, took effect as a lease in possession.

Cur. adv. vult.

TINDAL, C. J., now gave judgment.—This was an action of covenant, brought against the defendant for the recovery of certain additional rents reserved in a lease by way of penalty for the breach of farming covenants. The lease was made in 1814, by *James Sers*, the tenant for life, under a power of leasing given to him by the will of his father, *Peter Sers*; and no objection is taken as to the lease not being made in compliance with the particular terms of the power. The plaintiff claims as the assignee of the reversion of such lease, resting his claim upon a term of 1000 years, created in the year 1828 by the surviving executor, named in the will of the said *Peter Sers*, under a power, given by the will to the executors, to raise money for the payment of debts and legacies; and no question whatever is raised as to the due execution of this power.

But the defendant sets up, as an answer to the plaintiff's right of action, a demise by *J. S.*, the tenant for life, to *Thomas Clement*, prior, in point of date, to the execution of the leasing power, *viz.*, upon the 7th of *May*, 1812, for the term of ninety-nine years, if *J. S.* should so long live, contending that the creation of this term for ninety-nine years, suspended the exercise of the leasing power during the continuance of such demise.

What the particular object or intent of the demise for ninety-nine years may have been does not appear to us judicially, either by the plea which sets forth the indenture of demise, or by the replication. No argument, therefore, can be derived from any such object or intention; but the demise must be considered simply as a lease for ninety-nine years by the tenant for life, *not taking its effect under the power, but out of the estate* or interest *of the tenant*

Rattle v. *Popham* (2 Stra. 992; Cunn. 102; Ford's MSS. cit. 10 Ea. 181); *Churchman* v. *Harvey* (Amb. 335.)

(*l*) 3 M. & S. 382.

(*m*) *Ut supra.*

(*n*) Bunb. 92.

(*o*) He also cites Hard. 415, and *Goodright* v. *Cator*, Doug. 477.

(*p*) *Coote on Mortgage*, 698.

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for life, and leaving the immediate legal reversion upon such lease in such tenant for life. And whether, as against the lessee for 1000 years, the leasing power is or is not suspended by this demise for ninety-nine years, made by the tenant for life, appears to be the principal question in the case.

That the leasing power is not *destroyed*, appears to be well established by the cases. The tenant for life, not having conveyed away his life estate, but only granted a lease for years to *Clement, the utmost effect of this lease is, that the power of leasing has been suspended*, so far as regards the *lease and interest of Clement*, (*Long* v. *Rankin*, *Sugden on Powers*, App. No. 2, *Dow. Prac.*;) and if there had been no power created by the will besides that leasing power, and the contest had taken place between the grantee of the term for ninety-nine years, created by the tenant for life, and the lessee for twenty-one years, under the leasing power, there can be no question but that the former must have prevailed, if the leasing power subsequently exercised, operated to the prejudice of the grantee.

But the question in this case arises between the plaintiff claiming under a power given by the will to the executors in trust, and the lessee of the tenant for life under his power, and to determine whether the lessee can set up the prior grant of the tenant for life, it is necessary to observe the legal relation in which the several estates stand with respect to each other as to their priority. *It is well established, that whatever estates are granted by virtue of a power, take effect as if they were granted by the deed creating the power.* And consequently, in the present case, the demise for 1000 years, under which the plaintiff claims, being granted under the power given by the will, operates as if it had been created by the will itself, which gives such power to the executors. And, if considered as created by the will, it must of necessity over-ride the lease for ninety-nine years, granted by the tenant for life out of his own estate. Again, the lease for twenty-one years, which was granted under the leasing power, supposing that power not to be absolutely suspended, must be considered as if granted by the will itself, and therefore, in any case, not affecting the interest of the lessee, as over-riding the grant made by the tenant for life out of his own estate. The case, therefore, may be considered as if it stood thus: the donor of the power having granted a lease to *Goodson* for twenty-one years, afterwards grants the reversion to *Bringloe* for 1000 years, and then grants an estate for life to *J. S.*, who demises to *C.* for ninety-nine years, if he, *J. S.*, should so long live. Now, if the lease for 1000 years made in 1828, instead of being granted, as it is, under the power given to the executors, had been granted under a power given to the tenant for life, *Clement*, the grantee of the term for ninety-nine years, whether it was a mortgage term or otherwise, might well insist upon his right to the rents and profits in preference to the appointee of his lessor; or if the lease for twenty-one years had been disadvantageous to him, he might possibly have a right to dispute that also, as being granted in derogation of the lease: but if his term for ninety-nine years is over-reached by the lease for 1000 years, the term for ninety-nine years cannot, as it appears to us, stand in the way of the plaintiff, the termor for 1000 years, to prevent his recovering the rent in the same manner in which he might have done if the lease for ninety-nine years had never existed, in which case, it appears clear that the plaintiff might sue the lessee, as assignee of the reversion, upon the principle laid down in the case of *Isherwood* v. *Oldknow*. The lease for 1000 years

being granted by *Brown*, the surviving executor, under a power distinct from that given to the tenant for life, and which power the tenant for life had no right to obstruct, *Clement*, the lessee for ninety-nine years under the tenant for life, could not stand in a better situation than the tenant for life, and therefore, could have no right to set up his interest against that of the grantee of *Brown*, under the power; and if *Clement* himself could have no such right, what right can the lessee for twenty-one years, under the power, have to set up the right of *Clement* against the grantee of *Brown?* In other words, as the defendant derives his interest in the lease for twenty-one years from the donor of the power, and, as the plaintiff derives his reversionary interest from the same donor, what right can the former have to set up against the latter, a lease granted to a third person by the tenant for life?

Upon a careful examination of the several cases which have been referred to, and which cases are collected in the last edition of *Sugden on Powers* (especially *Rex* v. *Bulkely*, *Goodright* v. *Cator* (*q*), *Tyrrell* v. *Marsh* (*r*), and *Long* v. *Rankin*), it will be found that they are all so much distinguished by their circumstances from the present, that no one of them affords an authority in point; it becomes necessary, therefore, to look at the principle upon which this case is to be decided; and, upon principle, we think that there has been no suspension of the leasing power given to the tenant for life, so far as regards the grantee of the term under the power to demise, by way of mortgage given to the executors; and upon that ground we think such grantee has the immediate reversion in him, and may sue upon the covenants in the lease.

Judgment for plaintiff.

(*q*) 2 Doug. 460. (*r*) 3 Bing. 31; 10 Moo. 305.

STAGG *v.* WYATT and others.

June 12.

REPLEVIN. *First avowry*, for five years' rent, ending the 11th of *October*, 1836, due from the plaintiff to the previous churchwardens and overseers of the parish of *St. Helen's*, in the *Isle of Wight*; *second*, for one year's rent, ending the 11th of *October*, 1837, due from the plaintiff to the defendants, as churchwardens and overseers of the said parish for that year; *third* and *fourth*, similar to the *first* and *second*, but stating the rent to be due from *F. M. C.*, and *H. W.*, executrixes of *J. Chiverton*. *Pleas* in bar, *non tenuerunt*.

The absence of proof of either payment or demand of rent for sixteen or seventeen years, is evidence, though slight, of the determination of a tenancy from year to year.

At the trial, before Lord *Denman*, C. J., at the last *Winchester* Assizes, it appeared that in 1719, the then overseer of the parish demised the premises in question to *W. French* for ninety-nine years; subsequently, the residue of the term vested in *T. Stagg*; at his death his son, *J. Stagg* (the father of the plaintiff), became possessed; at his death, his widow continued in possession, and in 1790 married *J. Chiverton*; they were in possession in 1818, when the lease expired, and so continued afterwards; in 1820, *J. Chiverton* stated, in an answer in *Chancery*, that he was a tenant of the premises from year to year; and in 1822, he paid 4*l.* rent, of which the receipts were produced; soon afterwards he left the premises, and died in 1826, and *F. M. C*

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and *H. W.*, mentioned in the avowries, were two of his executrixes; Mrs. *Chiverton*, however, remained upon the premises from the time of her husband's leaving them up to the period of her own death in 1836; since when her daughter, the plaintiff, had been in possession. No rent was proved to have been paid, or to have been demanded since the time when *Chiverton* left the premises.

Upon this evidence the Lord Chief Justice had told the jury that they were at liberty to presume the determination of *Chiverton's* tenancy. The verdict passed for the plaintiff.

Crowder, Q. C., in *Easter Term*, obtained a rule *nisi* for a new trial, on the ground of misdirection; and also that the verdict was against evidence.

Erle, Q. C., and *Butt*, now shewed cause.—No tenancy had been proved after the expiration of the lease in 1818, or, at any rate, after the period from the payment of the rent had ceased: the *onus* of the proof lies here upon the defendants: the one payment proved to have been made by *Chiverton*, in 1822, was not sufficient proof, especially as no rent was shewn to have been paid afterwards; his admissions in the *Chancery* suit were not evidence against the present plaintiff. The lease of 1719 was void, as the parish officers could only let from year to year, *Doe*, dem. *Higgs* v. *Terry* (*a*), *Lame* v. *Cockell* (*b*).

Crowder, in support of the rule. The cases cited are an authority for the defendant: for they shew that payments of rent made to the parish officers, are evidence of a tenancy from year to year; this evidence is strengthened by *Chiverton's* express statement in his answer in *Chancery*; which is evidence against the plaintiff, as she claims through him. Here there is a tenancy from year to year established, and nothing to shew its determination. That determination cannot be *presumed*; and the direction to the jury that they might form such a presumption, was incorrect.—[*Tindal*, C. J.—It would, perhaps, have been a safer course if the parish officers had proceeded by ejectment instead of by distress.]—If the distress had been made during *Chiverton's* life, it clearly would have been good, unless there were some direct proof of the determination of the tenancy; and the subsequent lapse of time is no presumption against such right. (Another point was raised, as to whether the executrixes, not being shewn to have entered on the premises, could be charged personally with the rent accruing after testator's death, and *Wms. on Executors*, 1076, 7, was referred to, but the Court expressed no opinion upon this point).

TINDAL, C. J.—If we can see any evidence to lead to a presumption that the tenancy has been determined, I think we ought not to send this case back to another jury. Now we cannot say there was no evidence on this head; though, if I had been in the place of the jury, I might, perhaps, have come to a different conclusion from what they have done; still, I am not prepared to say they were wrong. There was no evidence of any demand of rent having

(*a*) 1 Har. & Wol. 547; 4 A. & E. 275; 5 N. & M. 556.

(*b*) 4 A. & E. 478; 6 N. & M. 179.

been made by the churchwardens and overseers, whose especial duty it was to make such demand, if any rent were due. Under all the circumstances, this is not a case where the *presumptio juris* is, that the tenancy must have continued; and therefore, there was not any misdirection on the part of the Chief Justice.

PARK, J., and VAUGHAN, J., concurred.

COLTMAN, J.—Sixteen or seventeen years' abstinence from any demand or payment of rent is certainly some evidence for the jury, though slight, of the determination of the tenancy.

Rule discharged.

RAINE *v.* ALDERSON and STANWIX.

June 12.

CASE. The declaration stated, for that whereas, &c., a certain cottage, and *the land and soil* whereon the said cottage stood, with the appurtenances situate in, &c., was in the possession and occupation of a certain person, to wit, *Otin Peaurt*, as tenant thereof to the plaintiff, the reversion, &c., belonging to the plaintiff: and whereas, before and at the time of committing the grievances thereinafter mentioned, a certain other cottage and *the land and soil* whereon the said cottage stood, with the appurtenances situate in, &c., aforesaid, was in the possession and occupation of *George Mauhgam*, as tenant thereof to the plaintiff, the reversion, &c., belonging to the plaintiff; yet the defendants, well knowing the premises, but contriving, &c., to injure the plaintiff in his said several reversionary estates and interests of and in the said cottages, &c., whilst the said cottages, &c., were so in the several occupations, &c., of the said tenants as such tenants thereof to the plaintiff and during the continuance of the said several tenancies, &c. to wit, on, &c., and on divers days, &c., wrongfully and unjustly, &c., and against the will of the plaintiff, did make, &c., five levels, five mines, &c., under, along, and through *the said earth and soil* on which the said first-mentioned cottage stood, and five levels, &c., under, &c., *the said earth and soil* on which the said second cottage stood, and out of the said levels, &c., then got and dug divers large quantities of coal, &c., *of the plaintiff*, to wit, 1000 tons of coal, and 1000 tons of stones, of great value, &c., out of each of the said levels, &c., and converted the same to their own use, by reason of which premises respectively, the said several cottages were respectively undermined, and did severally crack, sink, &c, and became and were permanently dilapidated and ruinous, and greatly and permanently lessened in value, and unsafe for habitation; by reason of which, &c., the plaintiff was greatly injured, &c., in his said several reversionary estates and interests in the said cottages, &c., and by reason thereof the said tenants were obliged to, and did quit the said cottages respectively, whereby the plaintiff was prevented from acquiring divers large sums of money, which would otherwise have accrued to him from the said tenants respectively, for the rent of the said cottages.

If a house, and the land on which it stands, are demised, without any reservation of mines, any coal that may be under such house is, during the tenancy, in the *possession of the tenant*;

Therefore, where *A.* let a house, and the land on which it stood, to *B.*; and *C.*, whose land lay contiguous, undermined the house, and carried away coal that was found beneath it, whereby the house sank:—*Held*, that *A.* might maintain *case* against *C.* for the injury, to his reversion.

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RAINE v. ALDERSON.

Second count: And whereas also, before and at the time of committing the grievances, &c., a certain cottage, situate, &c., and contiguous to the land of the defendant *Stanwix*, was in the possession, &c., of *Cain Peaurt*, as tenant, &c., the reversion, &c., belonging to the plaintiff, &c.; and whereas before, &c., a certain other cottage, situate, &c., contiguous, &c., was in the possession of *George Maugham*, as tenant, &c., the reversion, &c., belonging to the said plaintiff; and whereas before, &c., the plaintiff was possessed of certain other buildings, consisting of a butcher's shop, a stable, and a messuage, and dwelling-house, situate, &c., and contiguous &c., which said cottages, &c., at the several times, &c., were respectively ancient cottages, &c., and before and at the several times when, &c., respectively ought to have been, and still ought to be, sufficiently supported by the soil of the said land of the said *John Stanwix;* yet the defendants, well knowing, &c., to wit, on the 30th of *January*, 1833, and on divers days, &c., did wrongfully, &c., excavate five mines, in the said land of the said *John Stanwix*, under the surface thereof, and so near to the said cottages, &c., that, by reason of the said several premises, the soil of the said land of the said *John Stanwix* ceased to be a sufficient support to the said cottages, &c.; and the said several cottages, &c., and the said other buildings, &c., did severally sink, &c., and become dilapidated, &c., by reason of which said several premises, the plaintiff was greatly injured, &c., and the said tenants have been forced to quit, &c., to the plaintiff's damage of 1000*l.*

Plea, *Not Guilty.*

The cause was down for trial at the last Spring Assizes for *Durham*, before *Coleridge*, J.; when another action, in *trespass*, was tried between the same parties, for driving the same levels, whereby the plaintiff's land, *in his own possession*, had sunk, and for taking away the plaintiff's coal. In that action it was proved that the lands of the defendant, *Stanwix*, adjoined that of the plaintiff; that the defendants had, four years ago, worked out all the coal under the plaintiff's land; and that, in consequence of the undermining, a *creep* (or sinking in of the earth) had occurred, whereby the plaintiff's land had sunk, and the cottages were injured. The plaintiff recovered a verdict for 165*l.*, including the value of all the coal taken. When the present case was called on, it was objected, on the part of the defendant, that the action should have been in *trespass* and not *case;* but the learned judge thought the action was rightly conceived; leave was, however, reserved for the defendants to move for a nonsuit; and thereupon a verdict was taken by consent for the plaintiff, subject to the point reserved; and if the Court should be of opinion that such verdict ought to stand, it was agreed that the damages in the second action should be taken on the same principle as those in the first; and that the evidence in the first cause was to be considered as taken in the second.

W. H. Watson, in last *Easter Term*, obtained a rule *nisi* for a nonsuit. (The rule was also granted for an arrest of judgment, on the ground that the first count was in *case*, and the second in *trespass*, but this point was afterwards abandoned.)

R. Alexander, Q. C., and *Knowles*, now shewed cause.—In the action of *trespass*, the injury was done to the property *in possession of the plaintiff;*

but the present action was for damage to the plaintiff's *reversionary property*, and therefore *case* was the proper remedy.—[*Tindal*, C. J.—Is not the real question, in whose possession was the coal under these cottages? was it demised to the tenants who occupied them? If not, this would be nothing more than consequential damage, arising from the immediate act of trespass in taking the plaintiff's coal; and he ought to have brought trespass, with a *per quod*.]—The first count states that "the land and soil" were in the possession of the tenants, and that fact is not put in issue by the plea of *Not Guilty*, which only puts in issue the fact of the excavation, *Frankum* v. *Lord Falmouth* (*a*); the coal, therefore, under the cottages, was in the possession of the tenants, and they could have maintained trespass for taking it, *Lewis* v. *Branthwaite* (*b*), *Com. Dig.* "*Grant*," (E. 3), *Co. Litt.*, 4 a, 2 *Bl. Com.* 18. But even if the coal were in the possession of the plaintiff, he may sue for the damage done to the cottages, and, in that case, two actions would lie, *trespass*, for taking the coal, and *case*, for the injury to his reversionary interest in the cottages; there are many cases in which *trespass* or *case* may be maintained indifferently, *Branscomb* v. *Brydges* (*c*), *Smith* v. *Goodwin* (*d*), *Wells* v. *Ody* (*e*), *Lawrence* v. *Obee* (*f*).

W. H. Watson, in support of the rule.—The jury, by their verdict in the first action, allowed for the value of the coal, though not for the value of the cottages.—[*Tindal*, C. J.—That might have been a ground for the defendant to move in that action to reduce the damages.]—The cases cited on the other side do not bear out the position that the possession of the coal passed with the possession of the land to the tenants: the declaration only states, that "the land and soil" were in the tenant's possession; it does not state "land, soil, and *mines*;" and a demise of "land and soil" does not, of necessity, pass mines, *The case of mines* (*g*). The injury here was consequential upon an immediate act of trespass, and the action, therefore, should have been in *trespass*; *Thornton* v. *Austen* (*h*), *Harker* v. *Birkbeck* (*i*), *Pickering* v. *Rudd* (*j*).

TINDAL, C. J.—It appears to me that some confusion has grown up in this case by mixing up the former action of *trespass* with the present cause of action, which is clearly in *case*. This is, in point of form, an action by a reversioner for an injury done to his reversionary estate; the declaration alleges that certain cottages, and *the land and soil* whereon they stood, were in the possession of certain persons, as tenants to the plaintiff, the reversion thereof belonging to him; and that the defendants, by undermining the land, and carrying away coal thereout, caused the cottages to sink and crack, and thereby injured the plaintiff's reversion. The defendants have only pleaded

(*a*) 1 Han. & Wol. 1; 4 Nev. & Man. 330; 2 Ad. & El. 452; 6 C. & P. 529; 4 D. P. C. 65.
(*b*) 2 B. & Ad. 437.
(*c*) 1 B. & C. 145; 2 D. & R. 256; 3 Star. N. P. C. 171.
(*d*) 4 B. & Ad. 413; 2 Nev. & Man. 114.
(*e*) 2 Gale, 12; 1 Mee. & Wells. 452; 5 D. P. C. 95.
(*f*) 1 Star. N. P. C. 22.
(*g*) 1 Plowd. 310, 313, a. See also *Bishop of Winchester* v. *Knight* (1 P. Wms. 406); *Bourne* v. *Taylor* (10 Ea. 189); *Curtis* v. *Daniel* (*Ib.* 273); *Whitechurch* v. *Holworthy* (4 M. & S. 340; 19 Ves. 214.)
(*h*) Cited 1 Ld. Raym. 188.
(*i*) 2 Burr. 1556; 1 W. Bl. 482.
(*j*) 1 Star. N. P. C. 56.

the general issue; and there is, therefore, no traverse of the tenancy, or of the fact that *the land and soil* on which the cottages stood were in the possession of the persons named as tenants, nor of the plaintiff's reversionary interest. It is admitted, therefore, that at the time the injury was committed, the legal possession of the cottages, and the "land and soil" on which they stood, was in the tenants, and the reversion in the plaintiff; then, as the the "land and soil" will include all that is within it, the coal under the cottages was in the possession of the tenants, and for an injury done to his reversionary interest in such cottages by the removal of the coal beneath them, the plaintiff is clearly entitled to recover in the present form of action.

In *Wells* v. *Ody*, which was an action on the case for darkening the plaintiff's windows by building on a party-wall erected under the Building Act, it was objected, on the part of the defendant, that as the building was partly on the plaintiff's land, the action ought to have been *trespass*, and not *case*; but the Court held the action was well brought; and Lord *Abinger*, C. B., in giving judgment, said (*k*), "No case has been cited to shew where an injury has been done, of a consequential nature, to the comfort and convenience of the plaintiff, effected partly by an act of trespass, and partly by an act that was not a trespass, but from either of which the injury must and would have resulted, that the plaintiff is bound to bring the one form of action rather than the other" So in the present case, it may be a little uncertain whether the sinking of the cottages was occasioned by the taking away of the plaintiff's coal, or of the coal that was in the possession of the tenants, as being under their cottages; but, nevertheless, the action is rightly conceived in the present form.

PARK, J.—In *Wells* v. *Ody* it was doubtful whether the remedy was by an action of *trespass*, or an action on the *case*; but looking at the evidence given in the former action between these parties, and which it was agreed should be taken as if given in the present action, I think it has been properly brought in *case*. It is brought to recover an injury done to the plaintiff's reversionary interest in certain cottages, by reason of the defendant's having dug for coal under those cottages, for which the tenants might certainly have brought an action of trespass; and I entertain no doubt but that the plaintiff is entitled to recover damages in this action on the *case* for such injury to his reversion.

VAUGHAN, J., of the same opinion.

COLTMAN, J.—The defendant may, perhaps, have a right to complain that the jury in the first action gave too much damages, if, as has been alleged, they allowed for the whole of the coal, both that in the possession of the plaintiff, and that in the possession of the tenants; for in that action, the plaintiff had no right to recover for the coal which was under his tenants' cottages. But the difference would have been necessarily very small. As to the form of the present action, I consider that the plaintiff is entitled to damages in this form of action, if the coal was taken from under the tenants' cottages, and that was a question of fact for the jury. If the coal beneath

(*k*) 2 Gale, 15.

the cottages was demised to the tenants, the plaintiff could not, in an action of trespass, recover damages for taking that coal, nor for any injury consequential upon such taking; but he would have a clear right to recover in *case* for an injury to his reversion; now, unless there were a reservation of the coal, the presumption is that all passed by the demise, from the centre of the earth to the sky, according to the well-known maxim, "*cujus est solum ejus est usque ad cœlum.*

Rule discharged.

WILSON *v.* WILSON.

June 13.

SAME *v.* STEELE.

COVENANT, upon an indenture between the defendant and several others, shareholders in *The Imperial Distillery Company* (*a*), of the first and second parts, and the plaintiff (as a trustee), of the third part; whereby, after reciting the embarrassed position of the company, occasioned by the refusal of several shareholders to pay up the instalments due upon their shares, it was (amongst other things), witnessed that a committee should be formed for liquidating the debts, and winding up the concerns of the company; that the major part of the committee should have power to decide and act; that the said parties to the indenture of the first and second parts should and would contribute and pay, in equal shares and proportions, all sums of money which might, from time to time, be required for the payment or satisfaction of all or any of the debts, sums of money, bills of exchange, interest, bills of costs, salaries, costs, charges, and expences due from the company; and that accordingly each of them, (the said several persons, parties to the said indenture of the first and second parts,) should, from time to time, within ten days after demand made in writing by the plaintiff, pay to him the just and equal proportion of him, the covenantor, of all sums which should from time to time be required for the payment or satisfaction of the debts, &c., and that *the certificate of the committee*, or the major part of them, *should be conclusive evidence that the money was required* or wanted, *and of the proportion which each person was to pay. Averment*, that the major part of the members of the said committee, did, by writing under their hands, and in execution of the powers and authorities by the indenture vested in them, certify *as the fact was*, that the sum of 17,986*l.* was then required,

The shareholders of a joint stock company, by deed, covenanted to pay their proportionate shares of such a sum as a committee should certify to be required, to discharge the debts of the company; and it was thereby agreed that such certificate should be conclusive. The committee, upon a sudden emergency, made a certificate of a sum required, and the defendant, a shareholder, paid 150*l.* as his proportion. The committee afterwards made another certificate to a much larger amount, the defendant's proportion of which amounted to 529*l.*; this sum was demanded of him by letter, but in a postscript it was stated that he would have credit for the 150*l.* already paid.

The defendant, being sued upon his covenant and the certificate, for the 529*l.*, by one plea traversed the allegation in the declaration, that the committee had certified *as the fact was*, that the sum mentioned was required; and by another, alleged that the committee had fraudulently signed the certificate:—*Held*,

That, upon the first issue, the defendant was not estopped by the certificate from shewing that more was demanded than was really due;

And that, upon the second issue, the facts did not constitute a fraud in law.

(*a*) See *Green* v. *Barrett*, 1 Sim. 45, which arose out of the proceedings of this company.

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or wanted, for the payment or satisfaction of some of the debts, &c., in addition to and in aid of the other monies then already received from the other sources in the said indenture mentioned, and then being in the hands of the said committee, and that the sum of 529*l.* was the proportion which the defendant was to pay of the said sum of 17,986*l.*, of which said certificate, and the premises aforesaid, the defendant afterwards, to wit, on, &c., had notice, &c. *Breach*, refusal to pay, on request.

Sixth plea, that the committee did not so certify *as the fact was, nor was it the fact*, that the sum of 17,986*l.* was then required, &c. *Issue joined.*

Eighth plea, that, at the time of making the certificate, the sum of 17,986*l.* was not wanted or required for the payment of the debts, &c.; and that *the committee*, well knowing the premises, *fraudulently* and deceitfully *signed the certificate*, with intent to defraud the defendant and others.

Replication, traversing the allegation that the committee fraudulently signed the certificate. Issue joined.

At the trial, before *Tindal*, C. J., at the *London* Sittings after last *Michaelmas Term*, it appeared that the committee, having had a sudden occasion for 5,000*l.* (part of the sum of 17,986*l.*), had made a previous certificate, calling upon the shareholders to pay 150*l.* each; that some persons, and among them the defendants in these actions, had paid the 150*l.*, but the majority of the company had paid nothing; that, subsequently, the certificate mentioned in the declaration, was made; that, when the formal demand, by letter, of 529*l.* was made upon the defendants (which was some months after the second certificate), it was accompanied by a postscript, stating that credit would be given to them for the 150*l.* which they had previously advanced.

(In four other actions, arising out of the same circumstances, the defendants had *not* paid any thing upon the former certificate.)

The jury returned a verdict for the plaintiff, expressly finding that there was no fraud; leave, however, was reserved for the defendant to move to enter a verdict for himself on the sixth and eighth pleas.

Erle, Q. C., in *Hilary Term*, obtained a rule *nisi* accordingly; against which

Wilde, Serjt., and *Whateley*, in *Easter Term*, shewed cause.—The certificate was conclusive by the terms of the deed in the absence of fraud, and that was negatived by the jury. It was the decision of a competent jurisdiction, established by the consent of the parties, and was, therefore, binding upon them; *Doe*, dem. *Morris* v. *Rosser* (*b*), *Whitehead* v. *Tattersall* (*c*). The difference between 529*l.* and 150*l.* was clearly due from the defendants, and that was all that was sought to be recovered; and the certificate was only a method of stating the account.

Bompas, Serjt., and *Cleasby*, in support of the rule.—Though the jury have negatived any fraud in fact, yet the certificate was fraudulent in law. It was false in fact, and to the knowledge of the committee, that the sum stated was required, and that constitutes fraud in law; *Foster* v. *Charles* (*d*). —[*Tindal*, C. J.—There must be damage to the party as well as mere false-

(*b*) 3 East, 11.
(*c*) 1 A. & E. 491.
(*d*) 6 Bing. 396; 7 Bing. 105; 4 M. & P. 61, 741.

hood; as you put it, a mere fable or allegory, published by a man knowing it to be untrue, would be a fraud.]—The damage to the defendant here is, that, if the certificate is to be taken to be conclusive, he is debarred from contesting his liability to pay a less sum than that which is certified to be due from him, although, to the knowledge of those making the certificate, a less sum was really due; it is the knowledge that a statement is false which constitutes a fraud, *Corbett* v. *Brown* (*e*), *Polhill* v. *Walter* (*f*). They also referred to *Pasley* v. *Freeman* (*g*), and *Haycraft* v. *Creasy* (*h*).

Cur. adv. vult.

TINDAL, C. J., now gave judgment.—The point brought before us in this case relates to the mode in which the finding of the jury ought to be entered in a special verdict upon the issues raised on the sixth and eighth pleas. The declaration contains an averment "that the major part of the members of the committee did, by writing under their hands, and in execution of the powers and authorities by the said indenture vested in them, certify *as the fact was*, that the sum of 17,986*l.* was then required or wanted for the payment of some of the debts, &c.; and further, that the sum of 529*l.* was the proportion which each of the parties named in the declaration (of whom the defendant was one), was to pay:" and the sixth plea traverses in terms, that they had so certified "as the fact was, nor was it the fact," upon which traverse the issue is joined. And upon the evidence, it appeared that, in point of fact, a part of this 17,986*l.* had been already raised and paid under a former certificate to the committee, for the purposes mentioned in the indenture; and that the defendant himself was one of the persons who, amongst others, had actually paid, under such former certificate, the sum of 150*l.* towards, and in part of, his share of the sum mentioned in the present certificate.

The plaintiff contends that, notwithstanding such proof, the finding upon the sixth plea ought to be in his favour, for two reasons; first, that, looking at the whole frame of the deed, the certificate is, as he contends, substantially true; for although some of the parties named in the declaration had paid a part, by far the majority of them had *not* paid any part of their *quota* of the 17,986*l.*, and that it was open to the committee to consider the whole sum as still unpaid, for the single purpose and object of making all contribute equally; the committee effecting, as they contended, such purpose and object by intimating to the defendant and the others, who had paid part of the demand, that credit would be given to them for the sum which they had respectively paid when they satisfied the residue. But we consider the certificate which has been given is inconsistent with the facts proved upon the trial, and we think it forms no excuse for certifying a larger sum to be due from the defendant than is actually due, that it would create a difficulty or intricacy in the certificate, if it should embody in it the statement of the account of each of the covenantors as it really stood; nor is it an excuse that no real injury will be eventually occasioned thereby to the defendant or the other covenantors, for the certificate is either true or false at the moment it is made,

(*e*) 1 M. & R. 108; 5 C. & P. 363; 8 Bing. 35; 1 Mo. & S. 85.
(*f*) 3 B. & Ad. 114.
(*g*) 3 T. R. 51.
(*h*) 2 East, 92.

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and if untrue at the time it is made, the notice given to the defendant when the larger amount was demanded from him, that instead thereof the smaller sum would be accepted, cannot set up the truth or validity of the certificate, the more especially as such notice was not given until some months after the certificate was signed.

The plaintiff, however, further contends, that the defendant is estopped from contesting the truth of the certificate, by the stipulation into which he entered in the deed, that the certificate of the major part of the committee, of the sums and proportions required "shall be conclusive evidence that the money is required or wanted, and of the proportion which each person is to pay;" to which objection it appears to us a sufficient answer, that the plaintiff has not relied upon the estoppel, but has himself opened the truth or falsehood of the facts stated in the certificate by averring them to be true, and thereby making the truth of such facts the very issue which the jury are called on to try, and that, on an issue so framed, the jury are bound to find according to the real truth of the facts proved before them. We, therefore, think the issue raised upon the *sixth* plea, must be found for the defendant.

The issue upon the eighth plea is raised upon the question, whether the committee, "well-knowing the premises, fraudulently and deceitfully signed the certificate with intent to defraud the defendants and others;" and it is contended by the defendant, that to certify that which is not true, and not true to the knowledge of the party certifying, amounts to fraud in law, and that the verdict on this issue also should be found for the defendant. But, admitting this definition of fraud in law to be correct when applied to the subject-matter of the several cases from which it has been drawn, as in the false representation of character and the like, we think it inapplicable to the issue, as framed upon this record. For we cannot understand the issue in any other light than as raising the question of *fraud in fact*, nor can we conceive terms more apposite than the present to express the charge of fraud and covin in fact. The plea imputes the conduct of the persons signing the certificate to some unworthy motives, such as the intention to raise more from the contributors for private purposes of their own, than was really due, or the like; whereas, upon the evidence, it is perfectly clear, from the notice given at the same time with the demand, that the only object and intention of the committee was te raise, by one single certificate, which applied to all the covenanters equally, the proportion that was really due, from each individual contributor, after giving him credit for the sums he had paid. It was no more than the adopting of a piece of machinery which was not properly calculated for the object, with perfect *bonâ fides* on the part of the committee.

We think, therefore, the finding on the eighth plea should be entered for the plaintiff; and we think the fact found in four other actions brought on this deed, *viz.*, that in those actions the defendants had *not* paid the 150*l.* under the former certificate and demand, will make no difference as to the finding upon the issue raised on the *sixth* plea in those actions; for the certificate as to the gross sum certified to be due, is as much disproved by the evidence in those cases as in the present.

Judgment for the defendant on the *sixth* plea; for the plaintiff on the *eighth* plea.

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June 13.

By an agreement, *A.*, the owner of certain land, covenanted with the defendant that, when any of the houses thereinafter covenanted to be built by the defendant according to a plan, should be finished, *A.* would demise them to the defendant or his nominees; reserving to *A.* a right of way over certain streets marked in the plan; to hold *the said piece or parcel of ground for* eighty years; the defendant entered, paid rent, and built the houses:—*Held*, that by this instrument, there was only a covenant to demise as to the part to be built upon, but that there was an actual demise as to the streets; and therefore, that *A.* could not maintain trespass against the defendant for building a wall across the end of one of such streets.

A plea, stating a covenant to demise *the whole of the land*, is not supported by such an agreement.

A plea of leave and licence to *erect and maintain* a wall, is not supported by proof of licence to *erect* one.

TRESPASS, for breaking and entering the plaintiff's close, and erecting a wall, in *June*, 1835. *Second count*, for a similar trespass in *March*, 1836.

Pleas: first, Not Guilty; *second*, that the plaintiff was not possessed of the close in question; *issue* thereon. *Third* (to the first count), that the defendant was possessed of the close under certain articles of agreement of *June* 14th, 1826, by which the plaintiff covenanted to demise to him *the whole of the land* described in the agreement; *fourth* (to the first count), leave and licence under the agreement *to erect and maintain* a brick wall on the *locus in quo*; *fifth* and *sixth* (to the second count), the same as the *third* and *fourth*.

Replication, traversing the agreement and licence.

At the trial, before *Tindal*, C. J., at the *Middlesex* Sittings after *Trinity Term*, 1836, a verdict was found for the plaintiff, subject to the opinion of the Court, upon the following case:

By lease of 29 *December*, 1821, *John Alexander*, being seized in fee of a piece of ground, situate at *Old Brompton*, *Middlesex*, demised the same to *Samuel Harrison*, nurseryman, for twenty-one years, with a proviso enabling the lessor, at any time during the said term, to resume possession of part of the ground adjoining the *Fulham* road, for the purpose of building thereon; in which case the lessor was to fence off, at his own expence, the part resumed, by building between it and the remainder of the ground a close fence of not less than six feet in height. Under that proviso *J. A.*, in 1826, resumed possession of part of the ground, and on the 14th of *June*, 1826, articles of agreement, under seal, and with a 30*s.* stamp, between the said *J. A.*, of the one part, and the defendant, of the other part, were entered into and executed by them; whereby *J. A.*, for himself, his heirs, &c., covenanted with the defendant, his executors, &c., that, in consideration of the rents thereinafter covenanted to be paid, he would, when the boundary fence thereinafter particularly described, and the drains, &c., should have been completed, or any of the messuages thereinafter covenanted to be built should have been built, &c., agreeably to the covenants thereinafter contained, by indentures of lease, demise and lease unto the defendant, or unto such person as he should nominate, all such messuages, &c., as should be built upon that piece of ground belonging to him, the said *J. A.*, at *Old Brompton*; the same being bounded on the west, by a nursery ground of the said *J. A.*, and then in the occupation of *S. H.*, (of which piece of ground the *locus in quo* was parcel;) and which piece of ground was specified in the plan annexed to the now reciting agreement; and all ways, &c., to the said piece of ground, messuages, &c., appertaining: *saving and reserving to the said J. A.*, his heirs, &c., *a right of way through and over the* three *several streets*, marked F in the plan to the said agreement annexed, *to hold the said piece or parcel of ground and premises, &c., unto the defendant for eighty years*; yielding, paying, &c., unto the said *J. A.*, his heirs, &c., for the two first years of the said term, the annual sum of 50*l.*; for the third, 100*l.*; for the fourth, 150*l.*; for the fifth, 200*l.*; for the sixth, 300*l.*; and for the remaining seventy-four years, 400*l.* payable quarterly, clear of all deductions. And it was agreed that in each of the said

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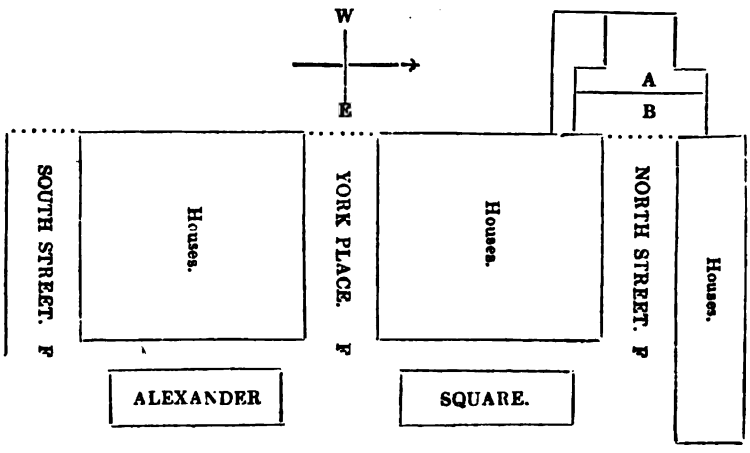
leases there should be contained certain specified covenants, and, amongst others, that *J. A.*, his heirs, &c., might, twice in every year, enter to ascertain the state of repairs, &c.; and, amongst other provisoes, there was to be one that it should be lawful for *J. A.*, his heirs, &c., *to use for the purposes of building, all such party walls, &c., as should abut on his ground,* paying to the defendant, his executors, &c., a reasonable compensation, not exceeding one moiety of the expences of any wall so used. And the defendant covenanted that he would accept such indentures of lease, &c., and execute counterparts, and pay the costs of the same and the reciting agreement and plan annexed, &c.; and (amongst other things), within three years from the date of the agreement, erect a good brick wall, seven feet high, along the west side of the piece of ground; and should, in the meantime, erect a close fence along the same side, and should lay out the said ground in forming the said terrace and streets, according to a plan to be approved of by the surveyor of *J. A.*; and, within eight years, build as many messuages or tenements as were specified in the plan thereto annexed, &c.; provided that, if any of the said yearly rents thereinbefore reserved, should be unpaid by the space of twenty-one days next after any of the appointed days of payment; or if the defendant, his executors, &c., should not perform the covenants and agreements thereinbefore expressed, it should be lawful for the said *J. A.*, upon any undemised part of the premises, to re-enter and enjoy, as of his former estate. And it was agreed that the lessee should not be liable for more than his own respective covenants; nor should any covenant be contained in the leases thereby granted, be construed to extend or apply to any thing further than the messuages, &c., in such lease respectively demised. And it was lastly agreed, that *J. A.*, his heirs, &c., should, when required by the defendant, deliver an abstract of his title to the said piece of ground; but that he should not deliver any abstract, or give any evidence of title to any purchaser from the defendant, or to any lessee of any of the messuages or tenements thereby agreed to be built.

The following ground plan was annexed to the agreement, shewing the ground, and proposed buildings thereon:



A. Proprietary School. B. *Locus in quo.*

The defendant entered pursuant to the articles, and built the messuages shewn in the plan; and the same were built, and the sewers, &c., and all other things made and done (unless the Court should consider what appears afterwards in this case not to be so), in pursuance of the agreement; and the messuages, as they were from time to time completed, were demised by the said *J. A.*, in his life time, and afterwards by the plaintiff (by distinct leases), to the nominees of the defendant, and, in some instances, to the defendant himself; in each lease was reserved a separate rent, and the aggregate of those rents made up the total amount to be secured, according to the said agreement. Each lessee was liable for his own rent and covenants only. The whole of the messuages were thus leased in pursuance of the said recited agreement. All the works done by the defendant under the articles of agreement, on the piece of ground, were completed previously to *October*, 1833. The brick wall along the west side of the ground was partly erected in the manner prescribed by the aforesaid indenture, and in lieu of the residue, a dwarf wall, with an iron railing, was erected at the end of the three streets, under the express sanction and approval of the plaintiff's surveyor, and with the knowledge and approbation of the plaintiff.

In *January*, 1831, the said *J. A.* died, and the plaintiff, as his only surviving son, and heir at law, became possessed of his real estate, including the hereditaments comprised in the said recited agreement, and granted leases of the remaining messuages to the defendant, or his nominees, according to the agreement.

The defendant, by himself, and the lessees of the houses agreed to be built, paid the rent stipulated for in the agreement.

In 1832, in consequence of the bankruptcy of the said *S. H.*, the lease of the 29th of *December*, 1821, was determined, and the remaining part of the nursery ground comprised therein came into the possession of the plaintiff.

A proprietary school was erected and finished near the *locus in quo* in the year 1836; it was wider than, and forms the third side of *North-street*, being set back about forty feet beyond the dwarf wall and railing already mentioned, which was erected on the *locus in quo*, being part of the land mentioned in the articles of agreement, at the end of the street, the front looking up the street to *Fulham-road*.

On the 25th of *May*, 1835, the dwarf wall and railing at the west end of *North-street* were removed, for the purpose of making the approach to the intended building for the proprietary school, which had then been just commenced. Aftewards, on the same day, the defendant, with his workmen, came and erected a close wooden fence across the street, on the site of the dwarf wall and railing which had been removed. About a fortnight afterwards, the defendant caused the wooden fence to be taken down, and erected, in its place, a dwarf wall with iron railings. On the completion of the building, the plaintiff, on the 10th of *March*, 1836, had the dwarf wall and railing again removed; upon which the defendant caused a wooden fence to be put up where the dwarf wall and railing had been, *viz.*, on the part of the land mentioned in the articles of agreement; and on the 20th of *March*, 1836, the defendant removed the wooden fence, and erected, in its place, a solid brick wall.

The above acts, committed by the defendant, were the trespasses complained

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of in the first and second counts of the declaration, upon which the present action was brought.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover; if so, the verdict was to stand; but if not, a verdict was to be entered for the defendant. In either case, the verdict was to be entered on the respective issues, as the Court might direct.

The case was argued in *Easter Term*, by *Ogle*, for the plaintiff, and *W. H. Watson*, for the defendant; the former contending that, by the agreement of *June*, 1836, no interest in the land passed to the defendant; the latter, that the interest *did* pass, and therefore, that the lessor could not bring trespass; as to the construction of the agreement, he cited *Com. Dig. Parols* (A. 7); *Willes*, 332. The Court took time to consider.

TINDAL, C. J., now gave judgment.—The verdict in this action of trespass, will be found to depend on the inquiry whether, upon the facts stated in the case, the possession of the ground upon which the wall stood, which was erected by the defendant at the time of building such wall, did or did not belong to the plaintiff. If the legal possession of that piece of ground was vested in the plaintiff, he may maintain his action of trespass against the defendant for building a wall on his land; if, on the contrary, the plaintiff was not entitled to the possession, the verdict on the second plea, which forms an answer to the whole action, must be entered for the defendant. And this question will be raised between the parties upon the second plea, which contains a traverse of the plaintiff's possession; for as to the third plea, which sets up a title to the piece of ground in the defendant himself, and justifies the committing of the alleged trespasses, by reason of the defendant's possession under the articles of agreement of the 14th of *June*, 1826, as there is a replication which puts the whole of this plea in issue, we think the plaintiff may avail himself of a fatal variance between the agreement, as stated in the third plea, and the agreement itself, as set out on the special case; the plea, stating it to be a covenant to demise the whole of the land described in the agreement, whereas the agreement itself contains a covenant to demise the messuages only, as they should be successively built upon the land. Upon the third plea, therefore, we think the plaintiff is entitled to a verdict.

Now, the second plea is pleaded to the whole of the declaration; and the finding of the issue raised on it will depend upon the construction to be put upon the articles of agreement of the 14th of *June*, 1826. And we think, upon the proper construction to be put on those articles, and of the facts done by the parties, the possession of the *locus in quo*, at the time the trespasses were committed, was not in the plaintiff, and consequently, that the defendant is entitled to a verdict on his second plea.

That the *locus in quo* formed part of the land comprised in that agreement, is expressly found as a fact in the special case. The only question, therefore, is, whether the defendant took the legal interest in that portion of the land, either under the agreement itself or under any other contract to be implied from the entry of the defendant upon the land in question, and the payment of rent to the landlord.

Now, it would be difficult to maintain that the defendant took any interest under the instrument above referred to. Although the *locus in quo* forms

part of the land comprised within that instrument, and the plan to which it refers, there are no words whatever of any demise to the defendant of an interest in the whole of the land. The *habendum*, indeed, comprehends the whole of the land for the term of eighty years; the *reddendum* makes the rent issuable out of the whole of the land for the six first years, or at least, until the rent is apportioned upon the several messuages to be afterwards built; and, from some words inserted in the saving or reservation, there may be ground to contend that there is a covenant or agreement to demise the whole. But there are not, in our opinion, any words of direct demise to pass the legal interest in the whole to the defendant; and, as to the messuages which were intended to be built, and were, in fact, afterwards built upon the land comprised within it, the instrument amounts to no more than a covenant on the part of the owner of the land, to grant future leases of the several messuages as they should be successively built, either to the defendant himself, or to his nominees, upon the terms specified in the instrument itself.

There was, however, a portion of the ground described in the agreement and plan, over and above that upon which messuages were to be built. There was not only the piece of ground on which the wall in question was erected, but the ground intended to be formed into streets and pleasure grounds. And as there was no covenant by the owner to grant future leases of these portions of ground, the question is, in whom was the legal possession of these several portions of the ground vested under the instrument? And we think that, after the entry made under that agreement by the defendant, and the payment of rent, the legal possession did not continue in the covenantor, but the same was vested in the defendant.

With respect to the wall, the defendant enters into an express covenant within two years to build a wall seven feet high, in the spot where the trespass was committed. This covenant, unless there is something in the instrument itself to rebut the inference, would lead to the conclusion that the possession of the land on which the wall stood was in the defendant. In the next place the reservation of the right of way to the landlord over the three streets which were afterwards to be formed, affords, as it seems to us, an unanswerable argument that he had intended to part with the legal interest in the soil to the defendant; and the very covenant, that the landlord should be at liberty to use the party walls for building against them where they abutted upon his own ground, gives a sufficient indication of intention, on the part of the contracting parties, that he might extend the length of the several streets which were laid out, but negatives any intention that he might, by any building or fence across the end of the street, block them up.

Upon this instrument the defendant actually entered, took possession, and, before the messuages were built, paid rent; and we think, under these circumstances, he acquired the legal possession; and it is sufficient for the purpose of maintaining the second plea, if the defendant took under the instrument as tenant from year to year.

The fourth plea is a special plea of leave and licence under the agreement of the 14th of *June*, 1826. But, as that plea states the agreement to contain a leave and licence to the defendant *to erect and maintain* a brick wall upon the spot in question, whereas the agreement itself contains, at most, a licence to *erect* a wall, and is altogether silent about maintaining it, we think this

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Upon this instrument the defendant actually entered, took possession, and, before the messuages were built, paid rent; and we think, under these circumstances, he acquired the legal possession; and it is sufficient for the purpose of maintaining the second plea, if the defendant took under the instrument as tenant from year to year.

The fourth plea is a special plea of leave and licence under the agreement of the 14th of *June*, 1826. But, as that plea states the agreement to contain a leave and licence to the defendant *to erect and maintain* a brick wall upon the spot in question, whereas the agreement itself contains, at most, a licence to *erect* a wall, and is altogether silent about maintaining it, we think this

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plea is not made out by the evidence, and that the plaintiff is entitled to the verdict thereon.

The same observations which have been made upon the third and fourth pleas which are pleaded to the first count of the declaration, apply to the fifth and sixth pleas which are pleaded to the second count, in respect of which latter pleas the plaintiff, for the reasons before given, is entitled to the verdict.

Upon the whole, as the second plea goes to the whole action, and the defendant succeeds on that plea, he is, in effect, entitled to the judgment of the Court.

Judgment for the defendant.

June 14.

HINCHLIFFE *v.* Lord KINNOUL.

By a lease of a house, *with all appurtenances*, a right of way, necessary for the convenient occupation of such house, and previously enjoyed by the tenant, will pass.

In 1728, the ancestors of *G.* granted a lease of certain uncovered land for a term of years (expiring at *Lady-day*, 1824). The land was subsequently built upon, and in 1819, the residue of the term in a house (parcel of the first demised premises), had vested in the plaintiff; this house abutted on a passage, (also part of the said premises), a right of way in which had been exercised by the plaintiff and his predecessors, and which was necessary for the convenient occupation of the house, and to enable the occupier thereof to repair the wall abutting on the passage: in the last-mentioned year, *G.* granted to plaintiff a lease of the house, with all appurtenances, as then occupied by him, from *Lady-day*, 1824 (stated as the period when the original lease would determine); plaintiff covenanting to repair all walls, &c.; and in 1822, *G.* granted a lease of the adjoining premises (including the passage), to *H.* (whose interest afterwards vested in the defendant), from the time when the original lease would determine:—*Held*, *first*, that the right of way vested in the plaintiff as an easement, by the lease of 1819; and *secondly*, that the reversionary lease granted in 1819, took effect in possession immediately on the determination of the former lease; and consequently, that there was no unity of possession in *G.*, by which such easement could be destroyed.

CASE. The declaration stated that the plaintiff was possessed of a certain messuage or dwelling-house in the parish of *St. George, Hanover-square*, abutting, on the *north*, on *Green-street*, in the same parish, and on the *east*, adjoining to, and abutting on a certain way or passage formerly leading from *Green-street* aforesaid into a certain place called *Lee's Mews*. And whereas, before, &c., there was, and from thence, &c., hath been and is a certain coal-shoot in the said passage, communicating with the coal-cellar of the plaintiff, part and parcel of the said messuage, which same coal-shoot during, &c., was, and still is, necessary for the convenient, beneficial and proper use and occupation of the same messuage, &c.: and whereas also before, &c., a certain pipe for the conveying of water, necessary for the convenient use and occupation of the same messuage, was and is placed through and under the same passage, and a certain other pipe for conveying water, &c., from a certain water-closet, part of the aforesaid messuage, and necessary for the convenient occupation of the same, was and is placed through and down the eastern side or wall of the same messuage, which, during, &c., abutted and adjoined, and still abut and adjoin, upon and to the same passage, and by reason of the premises, &c., the plaintiff, during, &c., had and ought to have had, and still of right ought to have, a right, for himself and his servants, to enter, &c., on foot, into the same passage for the purposes of using such coal-shoot, and of using, filling, and occupying such coal-cellar, and of cleansing, amending, altering, and repairing such pipes, and such side or walls of the said messuage so abutting, &c., at all seasonable times. *Averment*, that, during the possession of plaintiff, to wit, on the 1st of *May*, 1834, and on divers other days, &c., it was necessary for the convenient occupation of the said messuage,

that the plaintiff and his servants, &c., might enter into the said passage for the purpose of using the coal-shoot, and filling the coal-cellar; and further, that the said pipes, and the sides or wall of the said messuage so abutting, &c., had become and were foul, broken down, injured, and out of repair, and it was necessary for the convenient occupation of the said messuage, that the plaintiff and his servants, &c., should enter into the same passage for the purposes of altering, repairing, &c., the said pipes and wall, whereof the defendant had notice; yet the defendant, well knowing, &c., wrongfully and injuriously put and placed certain planks, boards, bricks and stones, and certain gates or doors in, upon, and across the ends or openings of the said passage, and hath kept the same so put and placed, and the said gates or doors locked and fastened for a long space of time, to wit, &c., and during all that time, hath totally shut out and excluded the plaintiff and his servants from entering into the same passage for any or either of the purposes aforesaid, and hath obstructed him in the enjoyment of such rights and easements as aforesaid, &c.

Second count, for obstructing the plaintiff's right of way to the coal-shoot only.

Third count, for obstructing the plaintiff's right of way into the passage generally.

Pleas; third, to the first count, traversing the plaintiff's right of way *modo et formâ; seventh* and *ninth*, similar pleas to the second and third counts. (The other pleas were not material.)

The case was turned into a special verdict, stating the following facts:

That the plaintiff, for many years before, and at the time when, &c., was possessed of the messuage in the declaration mentioned (under a certain lease thereinafter mentioned), and which messuage abutted, on the *north*, on *Green-street*, and on the *east*, on the passage in the declaration mentioned, leading from *Green-street* to certain premises in the occupation of the defendant which, at the time of granting of a certain lease of the 20th of *July*, 1819, thereinafter mentioned, by the then Earl of *Grosvenor* to *Elizabeth Hinchliffe* and the plaintiff, led from *Green-street* to *Lee's Mews*, and that, during the plaintiff's possession, and for many years antecedent, there was a coal shoot, covered with a moveable iron plate, in the passage near to the *eastern* side of the plaintiff's messuage; which coal-shoot ran in an oblique direction down and into a coal-cellar belonging to the said messuage, and forming part thereof; and that there was a certain pipe for carrying off water, necessary for the convenient and beneficial use and occupation of the said messuage, and which was the sole pipe for the supply of water to the said premises, situate and being in the soil, under and along the said passage; and also certain other pipes for conveying water and soil from a certain water-closet, parcel of the said messuage, for the necessary and beneficial occupation of the same; which last-mentioned pipe, and also part of the first-mentioned pipe, ran and passed outside the *eastern* wall of the said messuage; and that the coal-shoot was, and still is necessary for the convenient occupation of the said messuage; and that the coal-shoot could not be used, and the needful repairs to the said pipes and wall abutting upon the passage could not be done without passing and re-passing along the passage; that, at the several times when, &c., the plaintiff had occasion to use the coal-shoot, and to repair the pipes and wall, and that the defendant hindered and obstructed him from passing along the passage for those purposes.

The following leases were then stated:

2d of *October*, 1728, from *R. Myddleton*, as committee of Dame *Mary Grosvenor*, a lunatic, to *T. Barlow* and *R. Andrews*, of part of a field called *Upper Hill Field*, in the parish of *St. George, Hanover-square*, for ninety-seven years, from *Lady-day*, 1727.

22d of *July*, 1729, from *Barlow* and *Andrews* to *W. Gray* and *J. Brown*, of part of the said premises for ninety-three years, from *Lady-day*, 1729. (The site of the plaintiff's messuage, and of the said passage, were comprised in both these leases.)

13th of *July*, 1730, from *Andrews* and the executors of *Barlow*, to *R. Umpleby*, of a part of the first-demised premises (comprising the plaintiff's messuage), for ninety-two years from *Lady-day*, 1730, which term became vested in *T. Grace*.

27th of *February*, 1764, from *T. Grace* to *S. Adams*, of part of the last-mentioned premises (comprising the plaintiff's messuage, described as abutting, towards the *east*, on a passage five feet wide), for sixty years and a half, from *Michaelmas*, 1761, which term became vested in *Mary Forrester*.

29th of *June*, 1799, from the executors of *Mary Forrester* to *Elizabeth Hinchliffe*, widow, the mother of the plaintiff, of the messuage in question, together with all out-houses, ways, paths, passages, &c., and appurtenances to the said messuage belonging or in any wise appertaining, for twenty-one years from *Midsummer*, 1799.

20th of *July*, 1819, from *Robert, Earl Grosvenor* (who was then entitled to the reversion in fee in the premises), to the said *El. Hinchliffe*, and the plaintiff, the said messuage (described as abutting towards the *east*, on the passage in the declaration mentioned), *together with all and singular the appurtenances* unto the said messuage, &c., belonging, or in any wise appertaining, for fifty-seven years and a half, from *Lady-day*, 1824, when the lease of 1728 would determine. This lease contained a covenant on the part of the lessees, *to repair*, &c., *purge, scour, cleanse*, &c., the said messuage, and all *the walls*, pavements, fences, *pipes*, &c., belonging to the said demised premises (*a*).

(*Elizabeth Hinchliffe* died in 1826.)

14th of *July*, 1730, from *Andrews* and the executors of *Barlow*, to *Oakman*, of the plot of ground immediately *south* of that demised to *R. Umpleby* for ninety-two years from *Lady-day* then last past.

15th of *July*, 1730, from the same lessors to *J. Richards*, of the ground immediately adjoining the passage, on the *east* side thereof, for ninety-two years, from *Lady-day* then last past.

16th of *July*, 1730, from the same lessors to *R. Morris*, of a further part of the original plot, on the *east* side of that demised to *Gray*, *Brown*, and *Richards*, on which a large mansion was built, together with the use and benefit, in common with other tenants, of certain intended mews, and of the ways leading into the same, for ninety-two years from *Lady-day* then last past.

25th of *March*, 1791, from *Richard Earl of Grosvenor*, to *Thomas Trevor*, *Lord Viscount Hampden*, of two messuages and premises, for twenty-nine

(*a*) As this lease is more fully referred to in the judgment of the Court (*post*, 348), it was considered unnecessary to set it out at greater length here.

years from *Lady-day*, 1824 (when the lease of the 2d of *October*, 1728, would expire.)

28th of *March*, 1793, assignment from *T. Le Fevre* (in whom the residue of the terms granted by the leases of the 2d of *October*, 1728, 22d of *July*, 1729, and 14th and 16th of *July*, 1730, had become vested), to the said *Viscount Hampden*, of the residue of the said terms.

24th of *September*, 1822, lease from *Robert Earl Grosvenor* of the messuage, &c.. standing and being on the *north* side of *Lee's Mews*, and abutting and adjoining in part towards the *north*, on ground and buildings in the occupation of —— *Hinchliffe*, widow, and towards the *west*, in part on a messuage ground and buildings in the occupation of the said —— *Hinchliffe* for sixty-one years, from the 5th of *April*, 1824, "at which time the lease of the 2d of *October*, 1728, would determine."

(Lord *Hampden* died on the 1st of *January*, 1830, having by will bequeathed his term in the said messuage to his wife. *Jane Maria Viscountess Hampden*, whom he appointed his executrix.)

17th of *August*, 1833, assignment by the executors of *Viscountess Hampden*, to the defendant, of the said term.

The special verdict then went on to state, that in 1789, and down to 1822, the passage in question had been used as a public thoroughfare from *Green-street* to *Lee's Mews*, situate at the back of the plaintiff's messuage, and had been paved and lighted by the parish; but that, after Lord *Hampden* had obtained the reversionary lease in 1822, he built coach-houses and stables at the *south* end of the passage, but free and clear from the coal shoot, and thereby prevented all persons from passing through; and also put up a gate at the *north* entrance of the passage from *Green-street*, which gate has been usually from that time kept locked, and the key thereof, during the time of Lord *Hampden*, kept by his porter, and since, by the defendant or his servants. That from 1788, down to the time of putting up the gate, the occupiers of the plaintiff's messuage used the passage for the purpose of carrying coals from *Green-street* to the coal-shoot when wanted (usually once or twice in a year), and also for the purpose of doing the necessary repairs to the pipes and wall of the plaintiff's messuage, abutting upon the said passage (the same having been done three times since 1788), without any interruption; and that, from the time of putting up the gate down to the time of the said refusal and obstruction by the defendant, the plaintiff had used the passage for the same purposes as before, by calling at the defendant's house for the key of the gate, which had been thereupon delivered to him; and afterwards returning the said key when the coals had been shot and the repairs done. But whether, &c.

The case was argued in last *Easter Term*; when *Wilde*, Serjt., on behalf of the plaintiff, contended that the user of the passage leading to the coal-shoot uninterruptedly from 1788, as found by the special verdict, and the reversionary lease granted by Lord *Grosvenor*, on the 20th of *July*, 1819, entitled the plaintiff to the easement claimed and disputed in the third, seventh, and ninth issues. He cited and relied upon *Cholmondeley* v. *Clinton* (*b*),

(*b*) 2 B. & A. 625; 4 Bligh, 3.

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Shep. Touch. 89, (2d rule,) *Hill* v. *Grange* (*c*), *Plant* v. *James* (*d*), *Barlow* v. *Rhodes* (*e*), *Willes*, 322; and distinguished this case from *Clements* v. *Lambert* (*f*), *Morris* v. *Edgington* (*g*).

Sir *W. Follett*, Q. C., on behalf of the defendant, contended that there was no such uninterrupted user as of right, as would entitle the plaintiff to claim the easement in question; and even if there had been, the unity of possession in the *Earl of Grosvenor* would have destroyed it; he cited *Bro. Abr.* "*Entre congeable*," *Com. Dig.* "*Chimin*" (D. 3), *Whalley* v. *Tompson* (*h*).

Cur. adv. vult.

TINDAL, C. J., now gave judgment.—This special verdict, which has been found upon the third, seventh, and ninth issues, stated in the pleadings, raises the question of the existence of the right claimed by the plaintiff in his declaration; namely, the right to pass over and upon the passage adjoining to and abutting on the plaintiff's messuage, for the purpose of using the coal-shoot placed in the passage, and filling the plaintiff's coal-cellar, being part and parcel of his messuage: and also for the purpose of cleansing, amending, and repairing the pipes for conducting water to, and carrying soil from, his said messuage, and amending and repairing the side and wall of the messuage itself, abutting on the said passage.

The plaintiff rests his title to this right upon the exercise and enjoyment of it, prior to and at the time of the granting of a lease by *Robert Earl Grosvenor* to the plaintiff's late mother and himself, and upon the legal operation of that lease; by which lease, bearing date the 20th of *July*, 1819, the said Earl demised the messuage now belonging to the plaintiff by the description therein contained, and to which it will be necessary afterwards more particularly to advert, to hold to the plaintiff's late mother and himself, from *Lady-day*, 1824, for the term of fifty-seven years and a half, from thence next ensuing.

The defendant, on the other hand, contends that the right claimed by the plaintiff cannot be supported in law; for that such right, if it ever existed, was altogether extinguished by the unity of possession of the plaintiff's messuage, and of the soil of the said passage; which, as he contends, took place in the *Earl*, at *Lady-day*, 1824, when the original ground lease, comprising as well the plaintiff's messuage as the said passage, and the various other adjoining messuages, expired by efflux of time, and let in the reversion of the said *Earl*; and the defendant further objects, that, unless it can pass as an *appurtenant*, it cannot exist at all, there being no words in the lease of 1819 capable of granting or creating a new right.

In order to determine the first question which has been raised between the parties, namely, whether the right claimed by the plaintiff has been extinguished by any unity of possession in the *Earl*, it will be necessary to ascertain precisely the legal interests of *Earl Grosvenor* and of the plaintiff, in relation to the messuage of the plaintiff, and also the legal interests of the said *Earl* and of those under whom the defendant claims, in relation to the

(*c*) Plowd. 167; Dyer, 130, b.
(*d*) 5 B. & Ad. 791; 2 N. & M. 517; S. C. in error, 4 A. & E. 749; 6 N. & M. 282.
(*e*) 1 Cr. & M. 439; 3 Tyrw. 280.
(*f*) 1 Taunt. 205.
(*g*) 3 Taunt. 24.
(*h*) 1 B. & P. 371.

soil of the passage of the defendant, at the time of the execution of the said lease of the 20th of *July*, 1819. At the time of the execution of that lease, it appears, from the special verdict, that Mrs. *Hinchliffe* was in the actual possession and enjoyment of the messuage, with the appurtenances, in *Green-street*, now belonging to the plaintiff, under a lease granted to her by the executors of one *Mary Forrester*, deceased, bearing date the 29th of *June*, 1799, and expiring at *Midsummer*, 1820. By this lease, the executors of the said *Mary Forrester* had demised the messuage and dwelling-house, therein described, being the messuage in question, with the yard or garden *and appurtenances thereunto belonging, or usually occupied or enjoyed therewith*, as the same were late in the tenure or occupation of the said *Mary Forrester*. and it appears further, that *Mary Forrester* herself had held, by various *mesne* assignments, the residue of a certain lease which had been granted to one *Samuel Adams*, by indenture of the 27th of *February*, 1764, in terms of description of the premises demised, not less extensive than those of her own grant. The immediate reversion expectant on the lease so made to Mrs. *Hinchliffe* was, therefore, vested, at that time, in the executors of Mrs. *Mary Forrester*, under the said indenture of lease of 1764, which reversion expired seven days before *Lady-day*, 1822; and it appears from the special verdict, there was one other intermediate reversion outstanding, and in existence, interposed between the expiration of *Adams's* lease, and the expiration of the original ground lease granted by the *Grosvenor* family on the 2d of *October*, 1728, and expiring at *Lady-day*, 1824, on which latter day, and not until that day, the *Earl's* right to the actual possession would commence.

Again, with respect to *the soil of the passage* adjoining the plaintiff's messuage, it appears from the special verdict, that, at the time of granting the said reversionary lease of 1819, from *Earl Grosvenor* to the plaintiff and his mother, the interest in the soil of the passage was vested in *Lord Viscount Hampden*, who, by indenture of the 28th of *March*, 1793, had taken by assignment from the party in whom the several terms were vested, as well the residue of the original lease, as of the sub-lease granted to *Gray* and *Brown*, so far as related to the passage in question, and certain other parts of the premises; so that, at the time of the execution of the said lease of 1819, *Lord Hampden* was entitled to the possession of the soil of the said passage until *Lady-day*, 1824, when the original lease of 1728 would fall in, at which time, and not until which time, *Earl Grosvenor* would be entitled to the actual possession of such passage.

Now the original lease of 1728 comprised a considerable tract of ground, at that time completely open and unbuilt upon; not only the spot upon which the plaintiff's messuage was afterwards erected, but the soil of the passage adjoining thereto, upon and over which the disputed right is claimed to exist; and over and above that, a large extent of the surrounding ground, upon which numerous houses have been subsequently erected by various sub-lessees; and if the *Earl* had made no leases in reversion prior to the expiration of the original ground lease, he would have been entitled, at such expiration, to the possession of the whole tract of land comprised therein, whether covered or uncovered with buildings, and also of all the messuages built thereon during the continuance of that lease; and it is obvious that such unity of *seisin* and possession in the *Earl* would have extinguished all rights and easements of every kind which might have been acquired in or over any part of the soil demised, whether by grant, user, or otherwise how-

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soever, as between any of the sub-lessees, during the existence of their several interests; so that, with respect to the plaintiff's messuage, any right or easement which the occupiers thereof might have acquired by adverse enjoyment in or over the passage in question, would, at the expiration of such original lease, have been entirely destroyed and extinguished. The *Earl* might have remodelled the whole of the property included in the original lease, in any manner he thought fit; he might have relet the several houses, as they had been occupied before, or subdivided them into different parts or portions, and let them with or without the rights and easements which had been before enjoyed by the several lessees of the respective houses upon or in the adjoining soil.

Such, however, in the year 1819, being the state of the interest and title of the plaintiff, and of *Lord Viscount Hampden*, in their respective properties, it appears, by the special verdict, that the *Earl* did not wait the falling in of the original lease at *Lady-day*, 1824, when he would have been entitled to the actual possession of all the premises included therein; but that, on the contrary, on the 20th of *July*, 1819, he granted to the plaintiff and his late mother, the reversionary lease of the messuage now belonging to the plaintiff, which has been before adverted to; and subsequently thereto, namely, on the 24th of *September*, 1822, he granted to *Lord Viscount Hampden* a reversionary lease of the soil of the said passage next adjoining the plaintiff's messuage (amongst other premises), to commence at *Lady-day*, 1824, and to continue for sixty-one years thence next ensuing, under which lease the present defendant, the *Earl of Kinnoul*, now holds by assignment.

As to the first point, therefore, which has been raised on the argument of this case, we think it clear, upon the facts stated in this special verdict, that there was no unity of possession in the *Earl*, both of the messuage and of the soil of the adjoining passage, at the time of the expiration of the original ground lease. For that lease having been made to the original lessees, to hold, from *Lady-day*, 1727, for the full term of ninety-seven years thence next ensuing, it must have expired at twelve o'clock of the night of *Lady-day*, 1824. But the lease of 1819 demises to the plaintiff and his mother, to hold, from *Lady-day*, 1824, for fifty-seven years and a half thence next ensuing. The latter was, therefore, strictly and properly a reversionary lease, commencing at the precise moment when the original lease terminated, and leaving no interval whatever between; and, indeed, as if to prevent the possibility of such a construction, the commencement of the lease is expressly stated to be "from *Lady-day*, 1824, when the indenture of the 2d of *October*, 1728, would end and determine." And so again, with respect to the lease to *Lord Hampden*, of the 24th of *September*, 1822, the term thereby granted, although made to commence from the 5th day of *April*, 1824 (the day before old *Lady-day*), yet, by the addition of the words "at which time the said indenture of lease of the 2d of *October*, 1728, would determine," must be held to be strictly and properly a reversionary lease. When, therefore, the original lease expired, there could be no unity of possession in *Lord Grosvenor*, for there was no right to the possession at all: but the several and distinct possession of the messuage, in the state in which it had been before held, was continued in the lessees named in the lease of 1819; and the several and distinct possession of the passage, as it had been before held by *Lord Hampden*, was continued in him under the lease of 1822. Not that it is absolutely necessary, for the purpose of avoiding the legal consequences of

unity of possession, that *both* the leases should be reversionary; it is sufficient if there is a reversionary lease of the messuage alone. Even, therefore, if it could be contended, as to the lease of 1822, that there existed an interval between the expiration of the original lease, and the commencement of the term granted by that lease to *Lord Hampden*, upon the ground that the original lease, by the alteration of the style, expired on the 25th of *March*, 1824, and the term newly granted was not to commence until the 5th of *April* following; yet, in consequence of *Earl Grosvenor's* reversionary lease of the messuage in 1819, the right to the possession of both properties was severed, and there could be no unity of possession of *both the messuage and the passage in him;* and if so, it is obvious that he could not, by his subsequent grant, derogate from a former valid grant which he had already made.

We think, therefore, there is no ground for the objection, that the right in dispute was extinguished by unity of possession; but that the real question between these parties turns upon the proper construction to be put upon the lease made by the *Earl of Grosvenor* in 1819, for whatever effect that lease would have against the *Earl*, the same effect must be given to it against the present defendant, who claims only under the subsequent lease of 1822.

Now, at the time of the execution of the lease of 1819, it is found by the verdict that the plaintiff and his mother were in possession and occupation of the messuage in question, having a coal-shoot or coal-hole, of which the opening was in the passage, near to the house, and which ran in an oblique direction into the coal-cellar of the house; having also a water-pipe under the passage, which was the sole pipe for supplying water to the house; and two other pipes, one to supply water to a closet, and the other a pipe to carry soil therefrom; of which the first entirely, and the other in part, passed from the interior of the house, outside the eastern wall thereof: "all which," according to the finding of the jury, "*were necessary for the convenient and beneficial use and occupation of the said messuage.*" It is further found that the occupiers of the said messuage exercised the right of passing and repassing over the said passage, for the purpose of using their coal-shoot, and filling their coal-cellar, and of repairing the pipes and the side and wall of their messuage when necessary, for a long time, that is, from as early a period as the year 1788, downwards; and further, it is expressly stated by the jury, "*that the coal-shoot could not, during all the time aforesaid, and cannot be used, and that the needful and necessary repairs of the said pipes and side or wall of the said messuage, could not and cannot be done, without passing and repassing upon, through and along the said passage.*" Such, then, being the description of the messuage itself, and of the right actually exercised and enjoyed in and upon the soil of the passage, at and before the time of granting the reversionary lease, the *Earl of Grosvenor*, on the 20th of *July*, 1819, in consideration of a fine paid down, demises to the plaintiff and his mother the messuage or dwelling-house in which they had been residing for many years past, by the description of "all that piece or parcel of ground, and the messuage or tenement, erections and buildings thereupon, or on some part thereof erected and built, situate, &c., and abutting and adjoining towards the east on the said way or passage;" the lease then goes on to describe the other abuttals, the exact measurement of the land, and to refer to a plan or ground plot drawn on the margin of the indenture, "together with all and singular the *appurtenances unto the said piece or parcel of ground, messuage or tenement, erections, buildings and premises,*

belonging or in anywise appertaining." And the first question arising upon this lease, granted under the circumstances above stated, is, whether the use of the coal-shoot, the water-pipe and other pipes, passes thereby to the lessee? and we feel no doubt, upon this state of facts, that the coal-shoot, and the water-pipe and other pipes, did pass to the lessee as integral parts of the messuage or dwelling-house itself. They are stated in the special verdict, to be let into and through the walls of the dwelling-house; so that, if they were stopped or cut off, the messuage or dwelling-house must be damaged and dismembered, and would no longer be the same as that which the plaintiff and his mother had before enjoyed, and which is described in the new lease. And it must be remembered that, at the time the *Earl* grants the new lease, he must be taken to know the actual state and condition of the premises which form the subject matter of the demise. For although, when his ancestor granted the original ground lease in 1728, he demised a large vacant piece of ground, in 1819 the *Earl* demised a messuage or dwelling-house of a certain definite and known shape, size and character, consisting of certain parts and additions, as it then actually stood. We cannot, therefore, feel any doubt but that, under the description contained in the lease, the coal-shoot and the several pipes passed to the lessee as a constituent part of the messuage or dwelling-house itself.

The next question which then arises, and that upon which the determination of the present case rests, is, whether the right of passing and repassing over the soil of the passage and using it for the purposes above-mentioned, did also pass to the lessees under this lease. And we are of opinion that, upon the facts found in this special verdict, such right did pass as a necessary incident to the subject matter actually demised, although not specially named in the lease. The rule laid down in *Plowden's Com.*, 16 *a*, is, "that, by the grant of any thing, *conceditur et id, sine quâ res ipsa haberi non potest:* as, if one grants his trees, the grantee may enter upon his land for the cutting down and carrying them away," for which the authority of the year book, 2 *Rich.* 2, is cited (*i*). And again, *Twisden*, J., in *Pomfret* v. *Ricroft* (*j*), lays down the rule of law to be, "when the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use. As if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another, and not to me." Now, in the present case, the jury have found expressly in their verdict, that the passing and repassing over the way or passage is not merely *convenient*, but *necessary* "for the use of the coal-shoot, and of the pipes, and of the repairing and amending the same, and the side or wall of the house;" to the performance of which, it is also to be observed, the lessees are expressly bound by the covenant entered into by them with the lessor by the same lease.

(*i*) The passage in *Plowden* is as follows: "In 2 *Rich.* 2, in trespass, it is held as a maxim, that if a man has an interest in any thing by the grant or assent of another, and the party that has such interest cannot have the principal thing without doing another thing, there he may do the said other thing, and justify the same, because it is the means to come to his profit; for there it is held, that if one grants to me all his trees growing in his wood, I may cut them down and carry them through his land, and although his grass be trodden down with the carriage of them, he shall not have a writ of trespass for it." The maxim above cited is laid down as law in 5 Rep. 12 a, 47 a; 11 Rep 52 a; Co Lit. 56 a, 153 a; 2 Inst 306; Moo. 218, and elsewhere.

(*j*) 1 Saund. 323.

Since, therefore, as it appears to us, the right in question passed to the lessees under the reversionary lease of 1819, as incidental to the enjoyment of that which was the clear and manifest subject matter of demise, it becomes unnecessary to consider the question argued at the bar before us, how far the same right might or not pass to the lessees under the express words used in the lease itself, as "an appurtenant unto the said piece or parcel of ground, messuage or tenement, erections, buildings and premises, belonging or appertaining." There are strong authorities in the law books to shew these words capable of a wider interpretation, and of carrying more than is *an appurtenant* in the strictly legal sense of that word, where such interpretation is necessary in order to give that word some operation. Such are the cases in *Moor's Rep.*, 682 (*k*), *Archer* v. *Bennett* (*l*), *Hill* v. *Grainge* (*m*), and others. But we think it at once sufficient, and at the same time safer, to rely upon the ground on which we have already held that the right claimed by the plaintiff may be supported, and to give no opinion upon this second point.

Upon the whole, it appears, upon the facts stated in this special verdict, that the ground upon which the defendant has principally relied for the extinguishment of the right set up by the plaintiff, *viz.*, the unity of possession of the messuage and of the soil of the passage over which such right is claimed, does not exist: that the way in question was in fact enjoyed in *alieno solo* at the date of the lease, and that the same was necessary for the use and repair of the coal-shoot, pipes and side and wall of the house; that the lease was made by the person entitled to the reversion both of the messuage and the soil of the passage, that is, by a person who had the power to grant, or to continue the existence of, such right, at the time the lease was to come into operation and effect; and that, if the words of the lease will admit of such construction, it was the apparent intention of the parties to that instrument, arising from the state and circumstances of the property, and the language of the instrument itself, that they should be so construed; more especially when it is observed that the lessor, at the time he is making a reversionary demise of the messuage, which has been built upon his land during the existence of the original lease, requires from the lessee a covenant to repair, and keep in repair the said messuage and all other erections that should be built, and to purge, scour, and cleanse all pipes, &c., made, or to be made; words which are peculiarly applicable to the existing state of the premises.

Under these circumstances, we think, in supporting the right claimed, upon the legal principle on which we have placed it, without laying down that the easement or right is included in the express words of the lease, we do no more than carry into effect the intention of the parties themselves. We, therefore, give

Judgment for the plaintiff.

(*k*) *Brown* v. *Nichols*, S. C. nom. *Nicholas* v. *Chamberlain*, Cro. Jac. 121.

(*l*) 1 Lev. 131; Sid. 211; S. C. 1 Keb. 736.

(*m*) Plowd. Com. 170. This was an action of trespass, and the defendant had pleaded in bar a lease of the *locus in quo*, consisting of "one messuage, *one hundred acres of land to the same messuage appertaining*, from time beyond the memory of man, and one hundred acres of meadow." The reason there given why land cannot *strictly* be appurtenant to a messuage, is, that a thing of one substance cannot be appurtenant to another; and a messuage is of the same substance as land; but it is also said, that incorporeal hereditaments (such as *ways*), may be appurtenant to corporeal hereditaments, and 1 Finch. 97, is referred to; but in the margin the following note is added: "*Sed contra*, Yelv. 159; for that a way is an easement only, and not an interest; Hardw. 407."

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To a plea of *foreign attachment* in the *Mayor's Court* in *London*, alleging (*inter alia*), that the defendant, (the plaintiff below), *had execution* of the sum attached, the plaintiff (above) replied that he had no notice of the proceedings, and traversed the allegation that the defendant had execution. The record of the Court stated that execution had been had, but in point of fact, there was no execution, and this was proved (together with the whole course of proceeding in the Court), by *A.*, one of the attorneys of the Court, and the partner of *W.*, who acted as attorney for the garnishee: —*Held*,

First, that the allegation in the replication of want of notice was immaterial, as notice was not required by the custom;

Secondly, that the denial that the defendant had execution, was a good answer to the plea.

Thirdly, that *A.'s* evidence was admissible, and did not relate to matters of professional confidence.

Fourthly, that the jury were not precluded from finding that no execution issued, as the defendant, instead of relying upon the record as an estoppel, had taken issue upon that fact.

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ASSUMPSIT for money received. The *fourth plea* (*a*) (as to the sum of 410*l.*, parcel, &c.), stated a custom in the city of *London*, that when a person is indebted to any other person within the said city, and is sued for the same in the Lord Mayor's Court there, and is summoned, and a return is made of *nihil*, and the defendant does not appear, he may be attached by any money belonging to him being in the hands of any other person within the jurisdiction of the Court; and if the defendant, being so attached, does not appear at any one of the four successive Courts, and such defaults are recorded, then such other person is warned to appear to shew cause why the plaintiff should not have execution against him of the sum so attached. And if such person makes default, or appears and pleads, and has judgment against him, then *the Court awards judgment and execution to be had and executed* of the sum so attached, pledges being given to restore the sum to the original defendant, if, within a year and a day, he comes into Court and disproves the debt. The plea then went on to aver, that *J. G. Tyrie*, on the 31st of *January*, 1828, made plaint that the now plaintiff was indebted to him in 1000*l.*, within the jurisdiction of the Lord Mayor's Court; and that a summons issued and *nihil* was returned, and that it was alleged in the said Court that the now defendant, residing within the jurisdiction, owed the now plaintiff 500*l.*, and therefore the said *J. G. Tyrie* prayed process to attach the now plaintiff by the said sum of 500*l.*; and, on the 2d of *February*, a return was made that the now plaintiff was attached by the said sum of 500*l.* The plea then alleged four defaults by the now plaintiff, and a record of them all respectively, and that the process was prayed to warn the garnishee (the now defendant), to appear on the 7th of *February*; that afterwards, on the 16th of *July*, the now defendant appeared, and said he did not owe the said sum of 500*l.* to the now plaintiff, and such proceedings were thereupon had, that afterwards, on the 20th of *July*, 1830, *it was considered by the Court that the said* J. G. Tyrie *should have execution* of 410*l.*, parcel, &c., giving pledges to restore, &c. The plea then averred *notice* to the now plaintiff of all the premises, and proceeded thus:

And the defendant further saith, that the said judgment being in full force, and the said sum, to wit, of 410*l.* remaining unpaid and unsatisfied, the said *J. G. Tyrie* thereupon afterwards, to wit, on the day and year last aforesaid,

(*a*) See a plea stating the custom and proceedings at length, in *Morris* v. *Ludlam*, 2 H. Bl. 362. The plea, however, in that case was defective, inasmuch as, after stating the custom to be, that *if any person were indebted to any other person within the city*, &c., it omitted to aver that the defendant below was indebted to the plaintiff below, *within the city*; the present plea not only supplied this deficiency, but also alleged that every material fact took place "within the city and the jurisdiction of the Mayor's Court." See another plea, 3 *Wentw.* 247.

within the city and jurisdiction aforesaid, *sued and prosecuted out of the said Court a certain precept of execution*, directed to the said *Charles Sewell*, one of the serjeants at mace of the said Court, and thereby required the said *Charles Sewell* to take and receive of and from the said *John Hardy*, the defendant in this suit, the said sum, to wit, of 410*l.* then lately attached in his hands, in the said Court, as the proper monies of the said *H. J. Magrath*, at the suit of the said *J. G. Tyrie*, so that the said *C. Sewell* should have the said monies then in Court, to wit, within the city and jurisdiction aforesaid, without delay, to satisfy the said *J. G. Tyrie*, according to the tenor and effect of the said judgment so given as aforesaid; and that the said *C. Sewell* should have there then that precept, which said precept afterwards, to wit, on the day and year last aforesaid, was delivered to the said *C. Sewell*, who then and from thenceforth, until, and at, and after the return thereof, was such serjeant at mace as aforesaid, to be executed in due form of law; and the defendant avers, that the said *C. Sewell*, so being such serjeant at mace as aforesaid, did thereupon afterwards, to wit, on the day and year last aforesaid, take and receive of and from the said *John Hardy* (the defendant in this suit), the said sum, to wit, of 410*l.*, so attached as aforesaid, in his hands, and then and without delay, to wit, on the day and year last aforesaid, within the city and jurisdiction aforesaid, had the said monies then in the said Court, to satisfy the said *J. G. Tyrie* according to the tenor and effect of the said judgment so given as aforesaid, and then, to wit, on the day and year last aforesaid, within the city and jurisdiction, paid and delivered to the said *J. G. Tyrie* the said monies so by him, the said *C. Sewell*, taken and received as aforesaid. And the defendant avers that the said *J. G. Tyrie thereby* then, to wit, on the day and year last aforesaid, *had execution* of the said sum, to wit, of 410*l.*, according to the tenor of the judgment aforesaid in that behalf given, and then and there, and within the city and jurisdiction aforesaid thereof, acknowledged himself satisfied, as by the record and proceedings thereof, now remaining in the chamber of the *Guildhall* of the city of *London* aforesaid, more fully appears. And the said defendant in fact further says, that the said sum, to wit, of 410*l.*, so attached as aforesaid, and *of which* the said *J. G. Tyrie had execution* by virtue of the said judgment, *in manner and form aforesaid*, are part and parcel of the said several sums, &c., in the said declaration, and in the introductory part of this plea mentioned; and not other or different, and that the said *J. Hardy*, the now defendant, and the said *J. Hardy* in the aforesaid judgment and proceedings mentioned, are one and the same person, and not other or different; and that the said judgment *and execution* are still in full force, and not in the least by the said *H. J. Magrath* disproved or avoided; concluding with a *verification*.

Replication, to this plea, that the plaintiff *never had notice* of the said proceedings and the said several premises in the said *fourth* plea mentioned or any or either of them, or any part thereof; and that the said *J. G. Tyrie had not execution executed of the said sums* of the plaintiff so in the hands and custody of the defendant, *according to the custom of the said city*, for the said sum of 410*l.* or any part thereof; and that the said monies of the plaintiff in the hands and custody of the defendant, *were never had in execution*, as by the said fourth plea might be supposed, *and no execution* founded upon the said supposed judgment in the said fourth plea mentioned *was ever executed*; and that *the defendant paid the said sum* of 410*l.* (if ever it was

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paid), *without compulsion, and by connivance and collusion* with the said *J. G. Tyrie;* concluding to the country, &c. *Issue joined.*

The cause was tried before the Lord Chief Justice, at the Sittings at *Guildhall, London,* after *Michaelmas Term,* 1836, when a verdict was found for the plaintiff, subject to the opinion of the Court upon *a case,* stating, among others, the following facts:

The plaintiff is an *Englishman,* and carried on business as a merchant, abroad, from 1824 to 1834, inclusive; in the latter year he returned to *England.* The defendant is also a merchant in *London.*

In 1827, the plaintiff remitted to the defendant a bill of exchange for 79*l.* 17*s.* 4*d.*, and also consigned to him a cargo of coffee for sale; and by a letter, dated the 16th of *June,* in that year, the plaintiff requested the defendant to hold the proceeds of such bill and coffee to his, the plaintiff's, order.

On the 20th of *October,* in the same year, the defendant wrote to the plaintiff, as follows: "conceiving you only addressed this coffee to me in the absence of Mr. *Tyrie,* I have paid the proceeds to him, but with this understanding, that I am to account to you for the amount, if you do not confirm the act, or if you draw upon me in the interim; in either case I shall, of course, conform to your wishes."

Tyrie was the son-in-law of the defendant; and between him and the plaintiff there had been previous dealings.

On the 18th of *January,* 1828, the plaintiff wrote to the defendant a letter, in which, after stating that he had not received his due proportion of the proceeds of the coffee, as some that had been sent to Mr. *Tyrie* was of very inferior quality, he continued, "you will please rectify the difference and place the same to my credit: I shall, in the mean time, dispose of these funds as circumstances may dictate, conformably with the tenor of your letter of the 20th of *October,* 1827, either by drawing on you, or requesting the proceeds to be paid to my order.

On the 31st of *January,* in the same year, an action was commenced by *Tyrie* against the plaintiff, in the Mayor's Court of *London* for 500*l.*; and proceedings by foreign attachment were adopted against the present defendant, as garnishee, and such cause proceeded to judgment in manner hereinafter stated, but *no writs or precepts of execution were issued or executed in the cause,* or served upon the defendant below, or the garnishee, the now defendant.

On the 14th of *April,* 1829, the defendant wrote to the plaintiff a letter, in which he said, "subsequent to the date of my letter, Mr. *Tyrie* lodged an attachment upon the amount in my hands, but it has not been followed by any ulterior proceedings."

On the 6th of *June,* in the same year, the plaintiff wrote to the defendant: "I received, by the last packet in course, your favour of the 14th of *April,* by which I am for the first time made acquainted of Mr. *Tyrie's* attachment of my funds in your hands."

The present action was commenced in *January,* 1836, to recover the proceeds of the bill of exchange and the coffee, and interest thereon.

At the trial Mr. *Ashley,* one of the four attorneys of the Lord Mayor's Court, was called by the plaintiff; he was the partner of Mr. *Windall,* the attorney for Mr. *Hardy,* the garnishee in the Mayor's Court, during the proceedings in *Tyrie* v. *Magrath;* and the defendant's counsel objected to his

disclosure of any facts connected with the cause. The evidence was received, subject to the opinion of the Court as to its admissibility. He stated the practice of that Court in proceedings for foreign attachment, during his experience of twenty-five years, to have been according to the course hereafter set forth.

A public book, called the *Action Book*, is kept in the Mayor's Court office, used by all the attorneys. The first step, with a view to obtain a foreign attachment, is, that the plaintiff makes affidavit of debt, prepared by and sworn before the plaintiff's attorney in the cause; and which affidavit afterwards remains in his possession; the plaintiff's attorney then makes an entry in the *Action Book* of the names of the parties, &c.. thus:

"In the Mayor's Court, *London*.

"1828, *January* 31st, *Henry Jason Magrath*, defendant, at the suit of *John Garnett Tyrie*, plaintiff, in a plea of debt, upon demand of 1,000*l.* of lawful money of *Great Britain*, sworn 500*l.* and upwards.

"*Reynal* (attorney's name). Pledges, &c."

"Attachment thereon made, in the hands of *John Hardy*, the same day, between two and three in the afternoon, by *C. Sewell*."

This book is kept in the Lord Mayor's Court, lying open in the office, but no one has the custody of it; a paper is next prepared by the plaintiff's attorney, directed to the garnishee, called an attachment paper. No precept or process is issued against the defendants, nor any actual default made, nor are there any returns of *nihil* or defaults or otherwise made to any process. The defendant is not actually called. The Serjeant at Mace serves the attachment on the *garnishee*, and then makes an entry in the *Action Book* that he has done so, and signs it. Upon the expiration of four clear days, neither of the days being a *dies non*, after the service of the attachment, if no appearance is entered, a paper is prepared by the plaintiff's attorney, called a *summons*, directed to the *garnishee*; no entry is made of that summons, or the service of it. The Serjeant at Mace delivers the original summons, but makes no entry of it, and communicates verbally to the plaintiff's attorney the fact of the service. When the *garnishee* appears, such appearance is made by his attorney marking in the *Action Book* that he appears for the *garnishee*, naming him; and these are the only entries in the book.

A record is then made up *by the plaintiff's attorney*, stating the cause of action, and that the plaintiff prays process, according to the custom, &c., which was granted; that the Serjeant at Mace had summoned the defendant to answer the plaintiff, and that the Serjeant at Mace at the same Court returned, according to the said custom, that the defendant had nothing within the said city whereby he could summon him, nor was he found within the same; and that at the same Court the said defendant was solemnly called, but did not appear, but made default; and that it was alleged at the same Court that the *garnishee* owes to the defendant 500*l.*, and thereupon process was prayed against him to attach the same, so that the defendant might appear, &c.; and that it was commanded to the said Serjeant at Mace that he attach the said defendant by the said 500*l.* so being in the hands of the *garnishee*, so that the said defendant may appear, &c. It is then stated by the record, that the defendant was afterwards summoned to, and solemnly called at four several subsequent courts, but did not appear, and made four defaults; and thereupon, after the said four defaults recorded by the Court, process is prayed to warn the *garnishee*. The record is made up before the *garnishee* pleads, containing

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his appearance; and the record, in that state, is handed by plaintiff's attorney to the registrar, who enters an *imparlance*, and the parchment roll and the record is then handed to the *garnishee's* attorney by the registrar.

A rule to plead is given verbally by the plaintiff's attorney, and the registrar makes an entry of such rule upon the roll, and in his own book. The record is then handed to the attorney of the *garnishee*, and when the time for pleading is expired, the attorney for the plaintiff again demands the record. The attorney for the *garnishee* puts his plea on the record, and the registrar then authenticates it by an entry on the record. The registrar then joins the issue upon it, but no other than the entries before stated are made of any of the proceedings. The record is handed by the registrar back to the plaintiff's attorney, and remains with him, and he inserts the cause in the list of causes for trial prepared by the registrar. If the cause is tried, the registrar marks the verdict, and no further entry of it is made. The *postea* is made up by the plaintiff's attorney, who retains the record afterwards in his own possession. An entry of judgment is made by the registrar forthwith upon the record, at the instance of the successful party, who is entitled to sign judgment on the day following that of the trial. The plaintiff afterwards finds pledges, and it is the duty of his attorney to see that they are substantial; and in "*Tyrie* v. *Magrath*," the pledges were substantial and responsible persons. A *certificate of judgment* is afterwards made out by the plaintiff's attorney, according to the following form:

"Mr. *John Hardy*. I do hereby certify that judgment hath been entered against you in the Lord Mayor's Court, *London*, at the suit of *John Garnet Tyrie*, plaintiff, for the sum of 410*l.* heretofore attached, in your hands, as the proper monies of *Henry Jason Magrath*, defendant; and that security hath been given by the plaintiff in the said attachment, for restitution of the said monies, if his debt shall be disproved, according to the custom, as by the record of the said judgment now remaining in the said Court appears.

"Dated this 22d day of *July*, 1830.

G. T. R. Reynal,
Plaintiff's attorney,
Lord Mayor's Court Office,
Royal Exchange."

No entry is made of this certificate; it is usually served on the *garnishee's* attorney, and the plaintiff or his attorney, if the *garnishee* will pay, receives the money. If he refuses to pay, he may be taken into custody. When the money is paid, the practice is to make an *entry of satisfaction* on the record; and this was done in "*Tyrie* v. *Magrath*." The debtor (defendant), may at any time come in and dissolve the attachment before satisfaction has been entered; but when it is entered of record, he must come in within a year and a day afterwards.

It was further proved that, *until lately, writs of execution were rarely issued or executed; but lately it has been considered necessary, and such writs were accordingly issued and executed.*

The proceedings in the cause "*Tyrie* v. *Magrath*," were conducted throughout in conformity with the practice above set forth.

The defendant called no witnesses, but gave in evidence an examined copy of a judgment in the cause of "*Tyrie* v. *Magrath*" (*b*). It was agreed that

(*b*) After the entry of judgment, the record proceeded as follows: "And the

the Court might exercise the same power and discretion of amending the record, as a judge at *Nisi Prius* could under 4 & 5 *W.* 4, c. 42; that either party might turn the case into a special verdict, and that the Court should be at liberty to draw the same conclusions as the jury might have done from the facts stated.

The following marginal notes were attached to the case:

The plaintiff contends;

First, that there is *no execution executed* on the judgment in the Lord Mayor's Court, according to the practice of that Court, by foreign attachment, as established in the case of *Wetter* v. *Rucker* (*c*).

Secondly, that *payment under the judgment* in the Lord Mayor's Court, when there was no execution executed, *and not by compulsion, is no bar* to the plaintiff's right to recover in this cause; and that the *entry of satisfaction* of such judgment *is of no avail* against the present plaintiff, and does not prove execution executed.

Thirdly, that *the judgment* in the Lord Mayor's Court, on supposed proceedings and defaults which had no foundation in fact, *cannot bind the plaintiff* in this action, who was a perfect stranger, without notice of the proceedings in that Court.

Fourthly, that *the payment* by the defendant to *Tyrie* on the attachment (if made at all), *was voluntary*, without compulsion, and by connivance and collusion between defendant and *Tyrie*, his son-in-law.

Fifthly, that the *evidence of the practice* in the Lord Mayor's Court was *properly admitted.*

The case was argued in last *Easter Term*, by

Wilde, Serjt., for the plaintiff.—The first question will be, whether the plaintiff was entitled to give any evidence in support of the replication; and that will depend upon whether he was *estopped* from disproving the record in the Mayor's Court. He contends that he is not. Although *Palmer* v *Hook* (*d*), (where Lord *Holt* held that upon *non-assumpsit*, if the defendant gave in evidence that the debt was attached by foreign attachment, he must prove that the plaintiff was indebted to the plaintiff below), must be considered as over-ruled by *M'Daniel* v. *Hughes* (*e*), (where it was held, that a *garnishee*, against whom a recovery was had in the Mayor's Court in foreign attachment, after a summons to the defendant, and *nihil* returned, may protect himself by giving such proceedings in evidence upon *non assumpsit* in an action to recover the same debt, brought by the defendant below, *without proving the debt of the plaintiff below*, who attached the money in his hands; although, by the course of proceedings in the Mayor's Court, bail not having been put in, the plaintiff below was not obliged to prove the debt, to entitle himself to recover against the *garnishee*;) yet this latter case was decided upon the ground that it was not necessary to *prove* more *on the plea of* non-

said plaintiff here in Court, in his own person, found sufficient pledges to restore, &c., if the defendant, &c, that is to say, *Thomas Edwards* and *John Pirie*; and thereupon, a precept for that purpose being delivered, *the said plaintiff had execution of the said* 410*l.* in monies numbered, so attached and condemned as aforesaid; and thereof hath acknowledged himself satisfied.

(Signed), *John G. Tyrie.*"

(*c*) 1 B. & B. 494; 4 Moo. 172.
(*d*) 1 Ld. R. 727.
(*e*) 3 Ea. 366.

assumpsit than was required to be *averred*, if the attachment had been specially pleaded; and that it was not necessary, in pleading, to *aver* the debt due to the plaintiff below, according to the certificate of *Starkey*, the recorder of *London* (cited 1 *Wms. Saund.* 67, n. (1),) where the cases on the subject of foreign attachment are collected. Here, however, the plaintiff, in his plea, has alleged, amongst other things, that the plaintiff had notice of the proceedings in the Mayor's Court, and that execution issued against the *garnishee;* both of which are material and necessary allegations; and these the plaintiff, in his replication, has traversed. The real issue raised between the parties is, whether the money was paid by the defendant to the plaintiff below by collusion, and it is not competent to the defendant to set up the very record, which has been the result of the collusion, in order to disprove such collusion.—[*Tindal*, C. J.—Ought not the plaintiff to have replied that the judgment was obtained *per fraudem?*]—In point of fact, no judgment of the Court has been obtained; no execution executed; and the payment, therefore, by the *garnishee*, was not compulsory; *Wetter* v. *Rucker* (*f*), where *Dallas*, C. J., said, that the proceedings in the Mayor's Court ought strictly to be watched, and that the custom must be rigidly proved (*g*). In *Huxham* v. *Smith* (*h*), Lord *Ellenborough* held, that although a judgment in the Mayor's Court was *primâ facie* evidence that the debt arose within the city, yet, being a record of an inferior Court, proof to the contrary might be admitted.—[*Bosanquet*, J.—In the same case, Lord *Ellenborough* held, that to prove that the defendant, under process of foreign attachment, has paid a sum of money to a creditor of the plaintiff, the record of the cause in the Mayor's Court, with an entry of satisfaction, is conclusive evidence.]—It appears that the defendant there had admitted his liability; the case, however, is not very easy to understand. In *Paramore* v. *Pain* (*i*), and *Coke* v. *Brainforth* (*j*), it was held that, to a plea of *foreign attachment*, the plaintiff might reply that he was not indebted to the defendant. Another reason why the plaintiff would not be *estopped* by the record is, that he is no party to the suit below. Supposing, however, that the record would have operated as an *estoppel*, if it had been properly insisted upon, the defendant has lost the advantage of it by not pleading it; if a party will not rely on an *estoppel* when he may, but takes issue on the fact, the jury will not be bound by the *estoppel*, for they are to find the truth of the fact, *Vooght* v. *Winch* (*k*), cited 1 *Stark.* Ev. 227 (*l*). He referred also to *Dudlow* v. *Watchorn* (*m*), and *Hooper* v. *Hooper* (*n*). The next question is, whether, assuming it was open to the plaintiff to disprove the record in the Mayor's Court, it was competent to him to call the witness, *Ashley* (whose partner had acted as attorney for the defendant in the Mayor's Court), to prove the course of proceeding there. The only objection that had been raised to the witness was on the score of professional confidence; but this was not a case of professional confidence, as the evidence related to matters of a public nature; and therefore, the objection was untenable; besides, the same facts were proved by the

(*f*) *Ut supra.*
(*g*) 4 Moo. 184. See also *per Burrough*, J., *ib.* 188.
(*h*) 2 Camp. 19.
(*i*) Cro. El. 598.
(*j*) *Ib.* 830.
(*k*) 2 B. & A. 662.
(*l*) See also the other authorities there cited.
(*m*) 16 Ea. 39.
(*n*) 1 M'Clel. & G. 509.

Serjeant at Mace to the Court; to whom the objection could not possibly apply.

Bompas, Serjt., for the defendant.—The plea sets out the custom of the Mayor's Court in the customary form (*Com. Dig., Foreign Attachment*, A.), and avers that the usual proceedings took place, and the record is conclusive evidence upon this point; for being that of a Court of record, no proof can be admitted to contradict it; *Co. Litt.* 117, b; 260, a; *8th resolution in Mackally's Case* (*o*).—[*Park*, J.—In *Goddard's Case* (*p*), it is said, "that although the obligee, in pleading, cannot allege the delivery before the date, because he is estopped to take an averment against any thing expressed in the deed, yet the jurors, who are sworn to say the truth, shall not be estopped, for an *estoppel* is to conclude one to say the truth; and therefore, jurors cannot be estopped, because they are sworn to say the truth."]—This is not put as a case of *estoppel*, but of *conclusive evidence*, and that against all the world.—[*Tindal*, C. J.—It is *res inter alios acta;* how can it be conclusive against all the world?]—It is not open to any party to impeach the facts stated upon the record, *Reed* v. *Jackson* (*q*), *Rex* v. *Hopper* (*r*).—[*Bosanquet*, J.—The record is conclusive that the jury found such fact; but it is not conclusive against the world that in truth it did occur.]—In *Ramsbottom* v. *Buckhurst* (*s*), Lord *Ellenborough* said, "The judgment roll imports incontrovertible verity as to all the proceedings which it sets forth; and so much so, that a party cannot be admitted to plead that the things which it professes to state are not true. Would it be competent to aver that there was no such declaration, or plea, or trial, or that the Court did not pronounce such judgment as stated in the record? I apprehend it would not; and therefore, every part of the record, as long as it remains on the files of the Court, must be taken to speak absolute verity."—[*Tindal*, C. J.—The question there was merely whether, in order to prove the award of an *elegit*, it was necessary to produce a separate copy of the writ, or whether an examined copy of the record containing such award was sufficient for that purpose.] In the case of a probate, which is granted by an inferior Court, if it be averred in pleading, the other party cannot deny that there was a will, or that the testator was not competent to make one.—[*Tindal*, C. J.—The Ecclesiastical Court has exclusive jurisdiction upon that subject.]—There is no case in which it has been held that a party can deny that the facts took place which are averred upon the record.—[*Coltman*, J.—Do you go the length of saying, that the parties are bound in the case of fraud?]—No; but in the present case there is no fraud; there is no pretence for saying that the proceedings in this case were irregular; it was not, therefore, the case of a voluntary or collusive payment on the part of the defendant, *Hills* v. *Street* (*t*), *Carter* v. *Carter* (*u*), *Shaw* v. *Woodcock* (*v*).—[*Bosanquet*, J.—If a party goes to the creditor of another party, and tells him he has money belonging to the debtor in his possession, and advises him to issue a foreign attachment, would not that be collusive?]—It is not illegal for an executor, where there are several

(*o*) 9 Rep. 69, b.
(*p*) 2 Rep. 4, a.
(*q*) 1 Ea. 355.
(*r*) 3 Pri. 40.
(*s*) 2 M. & S. 565.
(*t*) 5 Bing. 37; 2 M. & P. 96.
(*u*) 5 Bing. 406; 2 M. & P. 732.
(*v*) 7 B. & C. 70; 9 D. & R. 889.

judgment creditors who have sued, to confess the action in favour of one in particular, so as to give him the priority (*w*). Then, as to the evidence of *Ashley;* being the partner of the defendant's attorney in the cause in the Mayor's Court, he could not be allowed to prove that omissions had been made which were prejudicial to his client.

Wilde, in reply.—The present case is even stronger than that put by the Court; for here the party does not go and solicit the issuing of an attachment, as an excuse for paying over the money; but pays the money first, and then provokes the attachment. In addition to the cases previously cited, he referred to *Self* v. *Kennicot* (*x*), *Outram* v. *Morewood* (*y*), *Basten* v. *Carew* (*z*), *Doe* v. *Huddart* (*a*).

Cur. adv. vult.

TINDAL, C. J., now gave judgment.—After stating the pleadings, as *ante*, p. 352, his lordship proceeded:—

Upon the facts proved in this case, three questions arise: first, whether the material allegations of the replication were proved, in point of fact; secondly, whether, by any technical rule of law, the plaintiff was precluded from proving, and the jury from finding, the truth of the case; and thirdly, whether the facts stated in the replication contain a sufficient answer to the plea.

It will be most convenient to consider first in order the last of these three questions. The first allegation of the replication is, that the plaintiff had *no notice* of the proceedings in the foreign attachment. This allegation does not furnish any ground of answer to the plea, for the custom of the city, as set out in the plea, is admitted in the replication, and has been confirmed in Parliament; and *the custom does not require that any notice should be given to the defendant in the attachment of the proceedings in the Mayor's Court.* That allegation, therefore, appears to us to be immaterial and idle.

The next allegation is, that there was no execution executed. This allegation is three times repeated, with some slight variation in terms; but the whole amounts to an allegation that there was no execution executed, pursuant to the custom. It scarcely requires an authority to shew that this allegation contains, in substance, a good answer to the plea; for the plea being only good by the custom, it follows that, unless the custom be pursued, the defendant must fail in his defence. Now, the custom is alleged in the plea to be, that, after execution had and executed, the *garnishee* shall be discharged as against the defendant below. The allegation in the replication shews, therefore, that the custom has not been complied with. If an authority were required on this point, the case of *Wetter* v. *Rucker* (*b*), and the other cases there cited are in point, to shew that, under such circumstances, the defendant is not discharged. The replication contains further a statement that the money paid was paid without compulsion, and by connivance and collusion.

(*w*) See *Went. Off. Ex.* 138 (ed. 1703); 2 *Wms. Ex.* 660.
(*x*) 2 Show. 506.
(*y*) 3 Ea. 346.
(*z*) 3 B. & C. 649; 5 D. & R. 558.
(*a*) 1 Gale, 260; 2 C. M. & R. 316; 4 D. P. C. 437.
(*b*) 1 Brod. & Bing. 491; 4 B. Moore, 172.

It is not very clear what precise legal ground of defence is here meant to be relied on, nor is it essential to inquire, as, for the reasons already assigned, the replication contains a sufficient answer to the plea.

The next question for consideration is, whether the material allegations of the replication were proved in fact. The only allegation which it was essential for the plaintiff to prove, was, that there was no execution executed, according to the custom. For, by the ordinary rule of pleading, *a party is only bound to prove the substance of the matter pleaded, that is to say, so much of a plea or replication as constitutes a complete and valid answer to the matter alleged in the adverse pleading, which it professes to answer.* Now, it is expressly found in the case that no writs or precepts of execution were issued or executed in the cause, or served upon the defendant in that cause, or on the *garnishee*, the now defendant. The replication, therefore, must be considered as proved, in point of fact. And this seems to be a convenient place for noticing an objection which was made, on the defendant's behalf, to the examination by the plaintiff of Mr. *Ashley*. Mr. *Ashley* was, at the time of his examination, the partner of Mr. *Wardell*, who had been the attorney for Mr *Hardy* in the foreign attachment. The counsel for the defendant objected, on that ground, to his disclosing any facts connected with the cause. But we think this objection is far too wide: the party objected to was not the attorney in the cause; and if he had been, an attorney may know many facts connected with the cause, which he has not learnt from his client, or in the course of the cause; and there is nothing to shew that he was examined, in the present instance, to any facts which came to his knowledge under the seal of professional confidence.

It remains only to consider the second question, which is, whether the plaintiff was precluded from proving, and the jury from finding, the truth of the case by a technical rule of law.

It was strongly insisted in argument, on the defendant's behalf, that the record in the foreign attachment was conclusive; and that not only the plaintiff, but the jury also, were concluded by it; and the cases of *Reed* v. *Jackson* (*c*), *The King* v. *Hopper* (*d*), and *Huxham* v. *Smith* (*e*), were relied on, and cases were referred to in which convictions before magistrates have been said to be conclusive of the facts stated in them; it was asked whether a probate could be controverted in evidence; it was insisted, that in no case could the facts stated in a record be disputed; and the judgment of Lord *Ellenborough*, in *Ramsbottom* v. *Buckhurst*, was cited in support of the proposition contended for in its fullest extent.

It is undoubtedly true, as a general rule, that no man can make any averment contradictory to a record. Our law books are full of cases, in which this doctrine is stated or distinctly implied; See *Plowden*, 491, *Johnson* v. *Smith* (*f*), *Baily* v. *Bunning* (*g*), *Rex* v. *Mann* (*h*), *Hynde's Case* (*i*), and the cases cited above. *But although it is true that no one can be allowed to aver against a record, and that not only parties and privies, but even strangers also, are estopped to aver any thing to the contrary, it is a different*

(*c*) 1 Ea. 355.
(*d*) 3 Price, 495.
(*e*) 2 Camp. 19.
(*f*) 2 Burr. 950.
(*g*) Sid. 271.
(*h*) 2 Str. 749.
(*i*) 4 Rep. 72; 2 Leon. 121; Owen, 138.

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question whether this estoppel will bind the jury from finding the truth of the fact, where the estoppel is not pleaded and relied upon. A jury may, indeed, it is said, find matter of estoppel, though it is not pleaded and relied on: and when it is found, the Court shall judge according to law, *Com. Dig. Pleader*, S. 4. And therefore, if a man makes a lease by indenture to *A.* of his own land, whereby *A.* is estopped to say it was not demised, the jury may find such matter, though it be not pleaded, *Com. Dig., quâ suprâ.* And in *Pleadal's Case*, cited in *Rawlyn's Case* (*j*), which was an ejectment, to which the general issue had been pleaded, because the jury did not find a deed indented, which took its operation only by conclusion, they were attainted, and judgment accordingly; the reason of which case may perhaps be collected from what is said in *Trevivian* v. *Lawrence* (*k*), that where an estoppel is of such a nature that it creates an interest, and works upon the estate of the land, the jury are estopped. But, however the case may be in the special case of an estate in the land by estoppel, and where the question arises upon the general issue, there are not wanting causes to shew that, in general, an estoppel does not bind the jury; and more particularly that, *if the estoppel appears upon the record, and the party who is entitled to take advantage of it, instead of relying upon it, goes to issue on the fact, he puts the matter at large, and the jury may disregard the estoppel.* Thus in *Goddard's Case* (*l*), which was debt on bond, the reason of the judgment was said to be that, although the obligee was estopped to take an averment against any thing expressed in the deed, yet the jurors, who are sworn to say the truth, shall not be estopped, for an estoppel is to conclude one to say the truth; and therefore jurors cannot be estopped, because they are sworn to say the truth. So in the case of *Speake* v. *Richards* (*m*), which was an action of debt for 523*l.* 17*s.* against *Richards*, sheriff of *Southampton*, on his return to a *levari facias*, that he had levied the said monies, which he had ready, the defendant, *quoad* 308*l.*, pleaded *nil debet*; whereupon the plaintiff took issue, and as to the rest, pleaded payment and an acquittance, whereupon the plaintiff demurred: one point urged for the plaintiff was, that the plea of *nil debet* was nought, being directly contrary to return of record; but it was answered that, since they had not relied on the estoppel, but taken issue, that could give no advantage.

The law on this point is laid down with great distinctness in the case of *Trevivian* v. *Lawrence*. "The Court," it is said, "took this difference: that where the plaintiff's title is estopped, and the defendant pleads the general issue, the jury are bound by the estoppel, for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for then they are to find the truth of the fact which is against him. Thus, in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements; because if he had pleaded that specially, the plaintiff might have replied the indenture,

(*j*) 4 Rep. 52; and in Cro. Eliz., 36, 37.
(*k*) 2 Ld. Raymond, 1051.
(*l*) 2 Rep. 4.
(*m*) Hob. 206.

and estopped him: but if the defendant plead *nihil habuit*, &c., and the plaintiff will not rely on the estoppel, but reply *habuit*, &c., he waives the estoppel and leaves it at large, and the jury shall find the truth, notwithstanding the indenture."

The cases we think furnish a sufficient ground for holding, in the present case, that *the defendant, by taking issue on the replication, has waived any benefit he might have derived from the estoppel*, and has left the matter at large, to be decided according to the truth and justice of the case.

Our decision, standing on the ground above explained, does not clash with the cases cited on behalf of the defendant; being distinguishable therefrom on the ground that the defendant has, by his own act, expressly and in terms waived the benefit of the estoppel, and referred the truth of the fact to the consideration of the jury.

Upon the whole, therefore, we think, that the issue raised on the fourth plea must be considered as having been found for the plaintiff; and consequently, that he will be entitled to judgment in his favour.

Judgment for the plaintiff.

The DUKE of GRAFTON *v.* The LONDON and BIRMINGHAM RAILWAY COMPANY.

June 8.

THE following case was submitted for the opinion of this Court, by order of the Master of the Rolls:

By letters patent, bearing date the 25th of *Charles* 2, his Majesty, for and in consideration of the true and acceptable service very frequently performed by his well-beloved and right trusty cousin and counsellor, *Henry*, Earl of *Arlington*, his principal secretary, and for divers other good causes and considerations him thereto especially moving, of his especial grace, and of his certain knowledge and mere motion, did give and grant unto the aforesaid Earl of *Arlington*, amongst other hereditaments, all that, the honor of *Grafton*, in the county of *Northampton*; and all that, the lordship and manor of *Grafton*, with all and singular their rights, members and appurtenances whatsoever; and also divers lands, tenements and hereditaments therein particularly described, situate, lying and being in the parishes of *Blisworth*, *Ashton* and *Hartwell*, in the county of *Northampton*, and elsewhere in the said county; all which property was described as having been theretofore granted to trustees for ninety-nine years, in trust for Queen *Katharine*, if she should so long live; to hold to the said Earl of *Arlington*, from and immediately after the determination of the estate of the trustees, for and during the term of the life of him, Lord *Arlington*, paying a yearly rent of 20*s*. And further, the said King, *in consideration of the natural love and affection* which he had and bore towards his most dear natural son, *Henry Fitzroy*, Earl of *Euston*, and *for divers other good causes and considerations* him thereunto especially moving, *of his especial grace, certain knowledge and mere motion*, for himself, his heirs and successors, did give and grant the aforesaid honor, lordship and manor of *Grafton*, aforesaid, and all and singular other the manors, lands, tenements, hereditaments, rents, farms, office of

An estate in tail, granted by Charles 2 to his natural son, the Earl of *Euston* (then an infant of nine years old), "in consideration of natural love and affection, and for divers other good causes and considerations."—*Held*, not to be within the Statute of 34 & 35 H. 8, c. 20, so as to prevent the tenant from barring the entail.

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feodary, coppices, woods and underwoods, reversions, remainders and other the premises aforesaid, and every part and parcel thereof, to have, hold and enjoy the same, with all their and every of their rights, members and appurtenances, to the aforesaid *Henry Fitzroy*, Earl of *Euston*, and the heirs male of his body lawfully begotten and to be begotten, immediately from and after the determination of the estate and interest of the aforesaid trustees of and in the said premises, and from and after the death of the aforesaid *Henry*, Earl of *Arlington*, to the only proper use and behoof of the aforesaid *Henry Fitzroy*, Earl of *Euston* and his heirs male, for ever; rendering and paying therefore yearly to the said King, his heirs and successors, the yearly rent of 20*s*.; and for default of such issue of the Earl of *Euston*, on the like consideration, and the like rent, to the King's second natural son, *Charles*, Earl of *Southampton*, and the heirs male of his body issuing; and for default of such issue, on the like considerations and the like rent, to the King's third natural son, Lord *George Fitzroy*, otherwise *Palmer*: and the said King, of his more abundant special grace, and of his certain knowledge and mere motion, did, for himself, his heirs and successors, declare and grant that the said letters patent, or the enrolment thereof, and all and every the gifts and grants in the same contained or specified, might and should be, to the said *Henry*, Earl of *Arlington*, and after his decease, to the said *Henry*, Earl of *Euston*, and the heirs male of his body, lawfully begotten and to be begotten, and for default of such issue, to the said *Charles*, Earl of *Southampton*, and the heirs male of his body, lawfully begotten and to be begotten, and for default of such issue, to Lord *George Fitzroy*, otherwise *Palmer*, and the heirs male of his body, lawfully begotten or to be begotten, in and by all things, good, valid and effectual in the law, towards and against the said King, his heirs and successors, according to the true intent thereof, and should be accepted, construed and interpreted, in all his Courts and elsewhere, in the most beneficial, liberal and favourable sense, for the benefit and advantage of the said *Henry*, Earl of *Arlington*, during his natural life, and after his decease, for the benefit and advantage of the said *Henry*, Earl of *Euston*, and the heirs male of his body, lawfully begotten and to be begotten; and for default of such issue, for the benefit and advantage of *Charles*, Earl of *Southampton*, and the heirs male of his body, lawfully begotten and to be begotten, and for default of such issue, for the benefit and advantage of the said Lord *George Fitzroy*, otherwise *Palmer*, and the heirs male of his body, lawfully begotten and to be begotten; and that without any confirmation, licence or toleration, to be from the said King, his heirs or successors, in that behalf procured or obtained, notwithstanding the misnaming or not naming, misreciting or not reciting, the aforesaid honor, lordship, manors and other the premises, by the now stating letters patent granted, or mentioned to be granted, or any part or parcel thereof, &c.; and notwithstanding any other defects in not naming or mentioning, or not rightly naming or mentioning the natures, kinds, sorts, quantities or qualities, metes or bounds of the premises or of any parcel thereof, or any person or persons who then were, or theretofore had been, seised of the premises or of any parcel thereof; any statute, act, ordinance, proviso, thing or matter whatsoever to the contrary thereof, in anywise notwithstanding.

The said *Katharine*, the wife of his said Majesty, King *Charles* the 2d, died in the life time of *Henry*, Earl of *Arlington*.

Henry Fitzroy, Earl of *Euston*, was born in the year 1663, and consequently was, at the time of the making of the letters patent, *of the age of nine years*.

In the year 1675, the said *Henry Fitzroy*, Earl of *Euston*, was created Duke of *Grafton*.

Henry, Earl of *Arlington*, died in the year 1683.

Upon the death of *Henry*, Earl of *Arlington*, *Henry Fitzroy*, Duke of *Grafton*, formerly *Henry Fitzroy*, Earl of *Euston*, under and by virtue of the before-mentioned grant, entered into the possession, or into the receipt of the rents and profits, of the said honor, lordship and manor of *Grafton*, and the several other lands, tenements, hereditaments and premises comprised in the grant, and thereby granted to him by the description of *Henry Fitzroy*, Earl of *Euston* and his heirs male; and he continued in such possession or receipt until the time of his death.

The said *Henry Fitzroy*, Duke of *Grafton*, died in the month of *October*, 1690; leaving *Charles*, Duke of *Grafton*, his eldest son and heir in tail male.

Upon the death of *Henry Fitzroy*, Duke of *Grafton*, *Charles*, Duke of *Grafton*, became entitled, as tenant in tail male, under the before-mentioned grant, to the honor, lordship and manor of *Grafton*, and the several other lands, tenements, hereditaments and premises comprised in the grant; and entered into possession or into the receipt of the rents and profits of the same, and continued in such possession or receipt until the time of his death.

The said *Charles*, Duke of *Grafton*, died on the 6th of *May*, 1757, leaving *Augustus Henry*, Duke of *Grafton*, his grandson, and heir in tail male.

Upon the death of *Charles*, Duke of *Grafton*, the said *Augustus Henry*, Duke of *Grafton*, became entitled, as tenant in tail male, under the said grant, to the honor, lordship and manor of *Grafton*; and the several other lands, tenements, hereditaments and premises comprised in the grant; and he accordingly, upon the death of *Charles*, Duke of *Grafton*, entered into the possession, or into the receipt of the rents and profits, of the same, and continued in such possession or receipt until the time of his death.

The said *Augustus Henry*, Duke of *Grafton*, died on the 14th of *March*, 1811, leaving the plaintiff, *George Henry*, Duke of *Grafton*, his eldest son, and heir in tail male.

Upon the death of *Augustus Henry*, Duke of *Grafton*, the plaintiff became entitled, as tenant in tail male, under the said grant, to the honor, lordship and manor of *Grafton*, and the several other lands, tenements, hereditaments and premises comprised in the grant; and entered into the possession, or receipt of the rents and profits, of the same, and has ever since been in such possession or receipt.

By an indenture of bargain and sale, bearing date the 6th of *February*, 1835, which was duly made and executed by and between the plaintiff, of the one part, and *John Parkinson*, Esq., therein described, of the other part, and was duly enrolled in the Court of *Chancery* on the 14th of the same month of *February*, 1835; after reciting, as the fact was, that the plaintiff was desirous of docking, barring and extinguishing all estates tail then vested in him, and all remainders and reversions and other estates whatsoever expectant thereupon, whether vested in or belonging to the King's most excellent majesty, or any other person or persons, of and in the lands and hereditaments thereinafter described or referred to, and of limiting the same and the

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inheritance thereof in fee simple to the use of the said *J. Parkinson*, his heirs and assigns, it was witnessed, for the intent and purpose of docking, barring and extinguishing all estates tail of the plaintiff, and all other estates tail, and remainders and reversions thereupon expectant or depending, whether vested in or belonging to the King's most excellent majesty, or to any other person or persons, of and in the lands and other hereditaments therein mentioned, and intended to be thereby bargained and sold, and in consideration of the sum of 10*s.* by *J. Parkinson* to the plaintiff paid, the plaintiff, under and by virtue, and in pursuance of the powers and provisions given by and contained in an Act of Parliament passed in the 3d and 4th years of the reign of *W.* 4, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," granted, bargained and sold unto the said *J. Parkinson*, his heirs and assigns all those plots, pieces or parcels of land, tenements and hereditaments, situate, lying and being in the parishes of *Blisworth*, *Ashton* and *Hartwell*, some or one of them, or elsewhere, in the county of *Northampton*, therein particularly described, the said hereditaments and premises being part and parcel of the honor, manor and lordship of *Grafton*, and other hereditaments in the county of *Northampton*, which by the hereinbefore stated letters patent were granted in remainder or reversion to *Henry Fitzroy*, then Earl of *Euston* (the lineal ancestor of the plaintiff), and the heirs male of his body, with remainders over to other persons, and the heirs male of their respective bodies, as therein mentioned, together with the appurtenances to the said premises belonging; to hold the said lands, and all and singular other the hereditaments and premises thereinbefore bargained and sold, or otherwise assured, or expressed or intended so to be, with the appurtenances, unto the said *J. Parkinson*, his heirs and assigns, to the use of the said *J. Parkinson*, his heirs and assigns, for ever.

The question for the opinion of the Court was, whether the estate tail of the plaintiff, and all other estates tail, and remainders and reversions thereupon expectant or depending, whether vested in or belonging to the King, or to any other person or persons of and in the lands and hereditaments comprised in the before-mentioned indenture of bargain and sale of the 6th of *February*, 1835, which were created or reserved by the before-mentioned letters patent of the 25th year of the reign of his late Majesty King *Charles* the 2d, were effectually barred and extinguished by the said indenture of bargain and sale.

The case was now argued by

Wilde, Serjt. (with whom was *J. Bayley*), for the plaintiff.—The estate tail of the plaintiff was effectually barred by the indenture of bargain and sale in question (*a*).

The 15th section of 3 & 4 *W.* 4, c. 74 (the Fines and Recoveries Act) (*b*),

(*a*) It appeared, in the course of the argument, that the plaintiff had contracted to convey part of the premises, granted to his ancestor, to the defendants, and the question between the parties was, whether the plaintiff had such a title in them as to enable him to compel a specific performance of the contract on the part of the defendants; and *Blosse* v. *Lord Clanmorris*, 3 Bligh. 62. and *Boyman* v. *Gutch*, 7 Bing. 379, 5 M. & P. 222, were referred to upon this point.

(*b*) Enacting "that after the 31st of *December*, 1833, every tenant in tail shall have full power to dispose of for an estate in fee simple, absolute, or for any less estate, the lands entailed, as

contains an express authority to a tenant in tail to bar remainders in the Crown; but by section 18 (*c*). there is a reservation of all questions arising under the Statute 34 & 35 *H.* 8, c. 20 (*d*). The present case, therefore, turns upon that Statute; and the real question is, whether the grant by *Charles* the 2d to the plaintiff's ancestor, the Earl of *Euston*, was in respect of *services*, so as to bring the case within the disabling operation of the Statute of *H.* 8, and prevent the tenant from barring the entail: the plaintiff contends for the negative of this proposition.

The Statute of *W.* 4, is a remedial Act, and should be construed liberally, whereas the Statute of *H.* 8, being in restraint of alienation and tending to create perpetuities, has always been construed strictly (*e*), and been held to be confined to grants from the Crown in respect of *services* only; *Bac. Abr.* "Fines and Recoveries" (C) (*f*), *Com. Dig.* Estates, B. 31 (*g*). In *Co. Litt.* 372, b, there are ten rules of construction of the Act; and in the 6th it is laid

against all persons claiming the lands entailed, by force of any estate tail which shall be vested in or be claimed by the person making the disposition at the time of his making the same; and also as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination of any such estate tail."

(*c*) "Provided always, that the power of disposition hereinbefore contained shall not extend to tenants of estates tail, who, by 34 & 35 Hen. 8, are restrained from barring their estates tail."

(*d*) Reciting, that "where divers of the King's most noble progenitors, and especially the King our sovereign lord, most liberally above all other, hath given and granted, or otherwise provided to his and their loving and good servants and subjects, as well nobles as other, manors, meases, lands, tenements, rents, services and hereditaments, to them and to their heirs males of their bodies, or to the heirs of their bodies lawfully begotten, minding, at the time of such gifts, not only to prefer and advance presently the *donees*, but also their heirs in blood of their bodies, according to the limitation of the said gifts: *to the intent that recompence for the service of such donees* should not only be a benefit for their own persons, but *a continual profit and commodity to and for their heirs* coming of their bodies, whereby such heirs should have in special memory and daily remembrance the profit that they have and take *by the service* of their ancestors, done to the Kings of this realm, and thereby be the better encouraged to do like service to their sovereign lord as to their duties of allegiance appertaineth. And forasmuch as sundry such donees in tail, and their heirs, have suffered and daily suffer, by their consents, untrue and feigned recoveries to be had against them, with common voucher or otherwise, of manors, meases, lands, tenements or hereditaments so given, granted or provided in tail, by the King's majesty, or his noble progenitors, as is aforesaid, to the intent by fraud, covin and untrue means, not only to bind and defeat their heirs inheritable by the limitation of such gifts, but also the King of his prerogative, wardship, *primer seisin* and other his rights; whereby questions and diversities of opinions have arisen, and yet be, whether such feigned and untrue recoveries against such tenants in tail, by their own consents of lands, tenements or hereditaments, whereof the reversion or remainder is in the King at the time of such recovery or recoveries had, should, after the death of the tenant in tail, bind the heirs in tail or not."

Sec. 2 enacts, that no *such* feigned recovery had against any *such* tenant in tail of any lands whereof the reversion or remainder shall be in the King, shall bind or conclude the heirs in tail, but after the death of *such* tenant in tail, the heirs in tail may enter, have and enjoy the lands, according to the form of the gift of entail.

(*e*) See 5 Cruise Dig., tit. 36, ch. 10, § 43.

(*f*) P. 696, 7th ed. The title "*Fines and Recoveries*," has two divisions, the first, treating of Fines, the second, of Recoveries; and the sections in each are headed with the same letters (A, B, &c.); so that, unless the page is also given, the reader may often be at a loss to find the passage referred to.

(*g*) See also Cruise Dig., tit. 36, ch. 10, § 46.

down, upon the authority of *Wiseman's Case* (*h*), "if the King, in consideration of money, or of assurance of land, or for other consideration, by way of provision, procure a subject, by deed indented and inrolled, to make a gift in tail to one of his servants and subjects, *for recompence of service*, or other consideration, the remainder to the king in fee, and all this appears of record, *this is* a good provision *within the Statute*, and the tenant in tail cannot, by a common recovery, bar the estate tail." An estate tail of the gift of the Crown for a *pecuniary* consideration, is not within the Statute; *Earl of Nottingham* v. *Lord Moreson* (*i*). So in case of a *moral* consideration, as where the grant was an *act of justice* on the part of the Crown; *Perkins*, dem. *Vowle* v. *Sewell* (*j*). In the present letters patent, "services" are mentioned as the consideration of the grant to Lord *Arlington*, but "natural love and affection" is the consideration of the grant to Lord *Euston*, who was the King's natural son: and although the law will not recognize the relation of father and natural child so far as to *intend* love and affection as the consideration of a grant, yet, where it is expressly stated to be so, it cannot be excluded, *Filmer* v. *Gott* (*k*), *Whalley* v. *Whalley* (*l*). These cases establish that the present grant discloses a sufficient consideration. Then the general words "for divers other good causes and considerations," have no legal effect to import a valid consideration; they would not be sufficient to raise an use; and they are, in fact, wholly inoperative, *Mildmay's Case* (*m*), *Wiseman's Case* (*n*), *Vin. Abr.* "Consideration," B. pl. 3 (*o*).

The words "of his especial grace, certain knowledge, and mere motion," are of no effect either way; they were introduced into royal grants after the Statute 4 *H.* 4, c. 4 (*p*); which was intended to prevent persons from soliciting grants from the Crown, but which did not restrain the king from making such grants of his own free-will.

With a view to the probability of the grant to Lord *Euston* having been made in consideration of services, it is material to look at the state of the parties at the time the grant was made; it appears that Lord *Euston* was

(*h*) 2 Rep. 16, a; S. C. nom. *Wiseman* v. *Barnard*, Moo. 195.

(*i*) Dy. 32, a, in marg.

(*j*) 1 W. Bl. 654; 4 Burr. 2223.

(*k*) 4 Brown P. C. 270.

(*l*) 3 Bligh. 1.

(*m*) 1 Rep. 175 a, 176 a.

(*n*) *Ut supra.*

(*o*) Citing *Smith* v. *Lane*, Leon. 170.

(*p*) "Also whereas heretofore many gifts and grants have been made to divers persons, as well of the revenues of the right of the Crown of *England*, as of wards, marriages, lands and tenements and divers other commodities, without good deliberation being had, as the said Commons have shewn to our said lord the King in Parliament, our same lord the King, being willing to provide a remedy, has declared that his intent is to abstain from making any such gifts or grants, unless to those persons who shall deserve them, and as shall seem best to the King and his council. And since it is the desire of all the estates of the realm that *nothing be so demanded of our same lord the King*, he wills that *all those who make any such demands of him* contrary to this Statute, *be punished*, by advice of him and of his council, and that *he who so makes such demand, shall never have the thing so demanded.*" A discussion arose during the argument, whether this Statute had expired: in *Ruffhead's* 4to edition, it is marked "Exp." In *Pickering's* edition there are the words "Ex. edit. Rastell," in the margin. The Court sent for "The Statutes of the Realm," and no entry was there found of its having expired. *Barrington* somewhat slyly observes, "This law, *if in force*, would greatly lessen the number of applications." *Obs. Stat.* 267, n., 2d ed. The observations of that learned author are, by an oversight, made to refer to a previous Statute (2 H. 4, c 2.)

between nine and ten years of age, and therefore the intendment which, in ignorance of the surrounding circumstances, might have been raised in favour of the grant having been made in consideration of services, is repelled and excluded by the existence of another and adequate motive.

Channell, for the defendants.—It has never been expressly decided that the operation of the Statute of *H.* 8 was limited to estates tail granted in consideration of services, or that such consideration must expressly appear on the face of the grant. In *Perkins* v. *Sewell*, the only point decided was, that the grant there in question was not within the Statute by reason of its not being by way of *gift;* but Lord *Mansfield* there said, "As for the *services* which are the consideration of such gift, these must, at a distance of time, be *presumed*, and need not be *proved;*" which is strongly in favour of the position here contended for on the part of the defendants; and this doctrine is adopted in 1 *Prest. Conv.* 145. The 6th rule cited from *Co. Lit.* is not very explicit, and it would rather seem to extend the operation of the Statute to "other considerations" besides *services:* and it is observable that, in the first part of the preamble of the Statute, the word "donees" is used generally, and it is only by force of the words "*such* donees," in the second clause of the preamble, that the former expression can be intended to be confined to gifts for services.

But the words in this grant, "for divers other good causes and considerations," are sufficiently large to include services. If this were a case of bargain and sale, a good consideration, whether of money or services, could be affirmed and proved under those words, *Fisher* v. *Smith* (*q*). All the cases in which natural love and affection have been held to be a sufficient consideration, are where the relationship between the parties was legitimate; and the Court will not intend such a consideration between a putative father and his illegitimate child; in *Shep. Touch.* 510, it is said, "if one (for divers good causes and considerations, or for divers great and valuable considerations), bargain and sell his land to another, or covenant to stand seised of his land to the use of another that is *not of his kindred;* no use will rise by this, unless it be proved that money or something else was given for it."

The Statute of *H.* 4, which has been referred to, is in favour of the defendants; for it shews that grants ought only to be made to the *deserving*, and therefore, the Court will intend, in favour of a grant from the Crown, that it was made in consideration of *services;* and it is by no means impossible,

(*q*) Moo. 569: "*Trin.*, 41 Eliz. Action on the case in the *King's Bench;* the case was that *Thomas Fisher*, seised in fee, *for divers considerations*, bargains and sells the land to *Edward Fitton*, Esq., now Knight, by deed indented and enrolled, which title *Andrew Fisher*, the now plaintiff, deduces to himself by conveyance from Sir *Edward Fitton*. *Smith* demurs, because there is no title in Sir *Edward Fitton*, without an averment that it was for money. And the whole Court (was) clear, that if one pleads a bargain and sale, and that no consideration of money is expressed, as in the principal case, there he ought to supply that by an averment that it was made for money; and the words *for divers considerations*, shall not be intended *for money*, without (such) averment. But if the deed expresses *for a competent sum* of money, this is sufficient, without shewing the certainty of the sum, and none of the parties shall say that no money was paid, for against this express mention in the deed, no averment nor evidence shall be admitted to say that no money was paid; wherefore it was adjudged against *Fisher*.

though it may be improbable, that a child, even of the tender age of the Earl of *Euston*, was capable of rendering services to the Crown.

Wilde, Serjt., in reply.—It is argued that love and affection cannot be *intended* as a consideration between a parent and an illegitimate child; it may be so; but here such consideration is expressly stated, and the question is, whether the Court can reject it for the purpose of supplying a consideration which is not stated: suppose the consideration were bad and immoral; would the Court reject that for the purpose of supplying a good one? How then, when there is a good consideration expressed on the face of the instrument, can they reject that in order to supply another? The relationship between a parent and his illegitimate offspring is recognized by law, illegitimate children having been held to be within the operation of the Marriage Act (*r*), so as to require the consent of their putative parents to render their marriage valid (*s*). As to the doctrine that services must be presumed, it is merely an *obiter dictum* of Lord *Mansfield's*, and it is not cited by Mr. *Preston* with any great approbation, for he speaks of it merely as a doctrine "advanced" by that learned judge.

The following certificate was afterwards sent:

We are of opinion that the estate tail of the plaintiff, *George Henry*, Duke of *Grafton*, and all other estates tail and remainders, and reversions thereupon expectant or depending, whether vested in or belonging to the King's most excellent majesty, or to any other person or persons of and in the lands and hereditaments comprised in the indenture of bargain and sale of the 6th day of *February*, 1835, which were created or reserved by the letters patent of the 25th year of his late majesty, King *Charles* 2, were effectually barred and extinguished by the indenture of bargain and sale above referred.

N. C. TINDAL.
J. A. PARK.
J. VAUGHAN.
T. COLTMAN.

(*r*) 26 G. 2, c. 33.

(*s*) See *R.* v. *Hodnett*, 1 T. R. 96; *Priestley* v. *Hughes*, 11 East, 1.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term, 2 Victoria, 1838.

The Judges in *Banc* this Term, were TINDAL, C. J., VAUGHAN, J., BOSANQUET, J., *and* COLTMAN, J.

DE BURGH'S BAIL.

Common Pleas.

Exr. 2.

Affidavit of sufficiency not in compliance with R. G. T. 1 W. 4, allowed to be amended.

HAYWARD opposed the bail. The affidavit of sufficiency stated that the deponent was "not bail for any defendant except the above-named defendant," which, he contended, was not in compliance with the form given by *R. G., T.* 1 *W.* 4 (*a*).

THE COURT allowed the affidavit to be amended. No costs on either side.

(*a*) Which requires that the affidavit should state that the deponent is "not bail for any defendant, except in this action."

GIBBON v. WILSON.

Exr. 2.

Where the copy of a writ of summons was given to the wife of a defendant, who stated she had given it to her husband, the Court would not allow the plaintiff to enter an appearance for him, as he could not swear to a personal service.

WILDE, Serjt., moved for a rule calling upon the defendant to show cause why the plaintiff should not be at liberty to enter an appearance for him. The copy of the writ of summons had been given to the defendant's wife at his residence, who stated at the time that her husband was ill: she went up stairs, and, upon returning, said she gave the copy, that she had given it to her husband.

Common Pleas.

GIBSON v. WILSON.

Per Curiam.—The application should be for a *distringas*, as the deponent cannot positively swear to a *personal service*, which is requisite in order to entitle the plaintiff to enter an appearance for the defendant (*a*).

Rule for a *distringas*.

(*a*) See 12 G. 1, c. 29, s. 1; 2 W. 4, c. 39, s. 3, and Sched. No. 1; *Rhodes* v. *Innes*, 7 Bing. 329; 5 M. & P. 153; 1 D. P. C. 215; *Digby* v. *Thomson*, 1 D. P. C. 363; *Herbert* v. *Davey*, 4 D. P. C. 726; *Williams* v. *Piggott*, 2 Gale, 115; 1 M. & W. 574; 5 D. P. C. 520.

Nov. 2.

SEEL *v.* INGE.

Attachment granted against the sheriff, for not bringing in the body, notwithstanding the Imprisonment for Debt Act.

HOGGINS moved for an attachment against the sheriff for not bringing in the body, pursuant to a judge's order obtained on the 14th of *September*.

Granted (*a*).

(*a*) This short point has been reported, as a learned judge is said to have intimated a doubt whether an attachment could, under these circumstances, issue, since the Imprisonment for Debt Act.

Nov. 3.

DOE, dem. KIRK *v.* ROE.

Ejectment for a chapel. Service on the surviving lessees and the sextoness sufficient.

BALL moved for judgment against the casual ejector in an ejectment for a dissenting chapel; the service was upon the surviving lessees, and upon the sextoness, as tenant in possession.

Granted.

Nov. 5.

SANDERSON *v.* LEE.

The Court refused to grant, as part of a rule to compute, that the bill (which was alleged to be lost), need not be produced before the Master.

BUSBY moved for a rule to compute the principal and interest on a bill of exchange, without producing the bill before the Master; he contended it was not necessary to produce the bill in any case.

TINDAL, C. J.—If that be so, the Master will act accordingly. You had better go before him in the first instance; and if either party is dissatisfied with his decision, he can come here again.

Rule granted, in the ordinary form (*a*).

(*a*) See *Brown* v. *Messiter*, 3 M. & S. 281; *Allen* v. *Miller*, 1 D. P. C. 421; *Clarke* v. *Quime*, 3 D. P. C. 26; *Green* v. *Hearne*, 3 T. R. 301.

DOE, dem. HEALEY *v.* ROE.

Common Pleas.

Nov. 6.

J. BAYLEY moved for judgment against the casual ejector. The affidavit stated, that the deponent had personally served four tenants in possession at the same time, but he did not state he had served *each* of them.

Where there are several tenants in possession, the affidavit of service in *ejectment* should state that *each* was served.

TINDAL, C. J.—You had better amend the affidavits in this respect, and then take the rule.

Ex parte ELIZABETH SAYER.

Nov. 7.

ADDISON, on behalf of a married woman, applied for an order that she might execute a deed for the disposition of certain lands belonging to her, without her husband's concurrence, under the Fines and Recoveries Act (*a*). It appeared, from her affidavit, that she was married in 1829, that her husband lived with her for seventeen weeks, and then left her, that she had not since heard of him, and did not know where he was.

Rule granted (*b*).

The Court made an order, under the Fines and Recoveries Act, for a wife to dispose of lands by deed, without her husband's concurrence, where he had left her a short time after marriage, and had not since been heard of.

(*a*) 3 & 4 W. 4, c. 74, s. 77, enacts, that "it shall be lawful for every married woman, by deed to dispose of lands which she alone, or she and her husband, in her right, may have; except that no such disposition shall be valid, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed." Sec. 91 provides that, "if a husband shall, in consequence of being a lunatic, or shall, from any other cause, be incapable of executing a deed, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of *Common Pleas*, by an order, to be made in a summary way, upon the application of the wife, to dispense with the concurrence of the husband, in any case in which his concurrence is required by this Act."

(*b*) See *Ex parte Gill*, 1 N. C. 168.

JONES *v.* PRICE.

Nov. 7.

IN an action of trespass for pulling down inclosures, in which the *venue* was laid in *Radnorshire*, where the premises were situated, the plaintiff had obtained a rule *nisi* that the action should be tried in *Herefordshire*, on the ground that an impartial trial could not be had in the former county by a common jury, as the cause involved a question concerning extensive rights of common; and that there were only forty-eight persons in the county competent to serve upon special juries.

Change of *venue*, where impartial trial could not be had.

E. V. Williams shewed cause; but the Court made the rule absolute on payment of costs.

Common Pleas.

Nov. 8.

BATEMAN *v.* DUNN.

By the 7th section of the Act for the Abolition of Imprisonment for Debt (1 & 2 Vict., c. 110), a judge is empowered to discharge any "prisoner who, at the time appointed for the commencement of the Act (*scil.* 1st of *October*, 1838), shall be in custody upon *mesne* process for any debt." Where a defendant was out upon bail; *Held*, that, upon an equitable construction of the Act, a judge might order an *exoneretur* to be entered on the bail-piece.

By the 3d and 7th sections, a defendant may be arrested or detained, if a plaintiff "shall, by affidavit, show, to the satisfaction of a judge, that there is probable cause for believing that the defendant is about to quit *England*, unless he be forthwith apprehended:"—*Held*, that the affidavit for that purpose ought to follow the words of the Act, and state the facts from which a probable cause for such belief may be inferred.

THE defendant had been arrested on the 13th of *September* last; on the 27th, special bail was put in. On the 1st of *October*, the Abolition of Imprisonment for Debt Act came into operation (*a*); on the 16th of *October*

(*a*) 1 & 2 Vic. c. 110, by *sec.* 1, arrest on *mesne* process is abolished, except as afterwards provided for. By *sec.* 2, all personal actions are to be commenced by writ of *summons*. *Sec.* 3 enacts, that "if a plaintiff in any action in any of Her Majesty's superior Courts, in which the defendant is now liable to arrest, whether upon the order of a judge or without such order, shall, by affidavit, show, *to the satisfaction of a judge*, that such plaintiff has a cause of action against the defendant, to the amount of 20*l.*, or has sustained damage to that amount, and that *there is probable cause for believing that the defendant is about to quit* England *unless he be* forthwith *apprehended*, it shall be lawful for such judge, by a special order, to direct that such defendant so about to quit *England*, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages;" and thereupon a *capias* may issue, in the form contained in the schedule. By *sec.* 4, the sheriff may thereon proceed to arrest the defendant, who is to remain in custody until he finds bail, or makes a deposit. By sec. 5, the above-mentioned order may be made at any stage of the proceedings before final judgment. By sec. 6, any defendant so arrested may apply for his discharge forthwith, and a judge may discharge him or not, as he may think fit; and the order of such judge may be appealed from to the Court. Sec. 7 enacts, that "every *prisoner* who, at the time appointed for the commencement of this Act, shall be *in custody* on *mesne* process, for any debt or demand, and shall not have filed a petition to be discharged under the laws for the relief of insolvent debtors, shall be entitled to his discharge upon entering a common appearance; provided that every such prisoner shall be *liable to be detained*, or to be again arrested, *by virtue of any such special order as aforesaid* at the suit of the plaintiff at whose suit he was previously arrested, or of any other plaintiff." The form of the writ of *capias* given in the schedule, is as follows:

"Victoria, &c. To the Sheriff, &c.

"We command you that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and take *C. D.*, if he shall be found in your bailiwick, and him safely keep until he shall have given you bail, or made deposit with you according to law, in an action on promises [or of debt, &c.], at the suit of *A. B.*, or until the said *C. D* shall, by other lawful means, be discharged from your custody. And we do further command you that, on execution hereof, you do deliver a copy hereof to the said *C. D.* And we hereby require the said *C. D.* to take notice, that, within eight days after the execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of to the said action, and that in default of so doing, such proceedings may be had and taken as are mentioned in the warning written or endorsed hereon. And we do further command you, that immediately after the execution hereof, you do return this writ to our said Court of , together with the manner in which you shall have executed the same, and the day of the execution thereof; or if the same shall remain unexecuted, then that you do so return the same at the expiration of one calendar month from the date hereof, or sooner, if you shall be thereto required by order of the said Court, or by any judge thereof. Wit-

an application was made to *Coltman*, J., at chambers, for an order to cancel the bail-bond, and enter an *exoneretur* on the bail-piece. This was opposed on the part of the plaintiff, who produced an affidavit, stating that the defendant was an *Irish* barrister, that he resided permanently in *Ireland*, and had no permanent residence here, and that the deponent believed the defendant had either gone, or was about to go back to *Ireland*. The learned judge having made the order as prayed for,

Wilde, Serjt., on the first day of Term, obtained a rule *nisi* to set it aside, on the ground that it was not authorized by the Act.

Sir *F. Pollock*, Q. C., now shewed cause.—He produced an affidavit by the defendant that he had *no present intention* of quitting *England*; which he admitted would not be a sufficient answer to the motion, if the Court, upon other grounds, would entertain it. But the Court would act in this instance in the same manner as in other cases where, a defendant being entitled to his discharge, they have relieved the bail (*b*); for although there is no clause in the Act immediately authorizing the exercise of such a power, yet it clearly comes within the spirit and principle of the Act. Then the affidavit on the part of the plaintiff is insufficient; it should have disclosed such circumstances as would have induced a judge to order an arrest or detainer under the third and seventh sections of the Act, and should have precisely stated, in the very terms of the Act, the deponent's belief that the defendant "was about to quit *England*, unless he were *forthwith* apprehended," and also those facts which would constitute a "probable cause" for such belief. The Act being in favour of liberty, should receive a liberal construction.

Wilde, Serjt., in support of the rule.—The question is, whether the Act confers the jurisdiction; the other side seek to confine the plaintiff to the very letter of the Act, in the form of the affidavit, though it is admitted that the case does not fall within the strict letter of the Act. The Act is of a speculative nature, and largely affects the commercial interests of the country, and the Court ought not too hastily to extend the powers given by the legislature. This is a case not provided for by the Act, which only deals with cases where a "prisoner" is "in custody;" its object being to relieve a party so situated. There is no restraint here, nor is it shewn that any

ness, at *Westminster*, [*or as the case may be*], the day of

"Memorandum to be subscribed to the writ: This writ is to be executed *within one calendar month* from the date thereof, including the day of such date, and not afterwards.'

(*b*) As where a defendant has obtained a certificate of bankruptcy before trial, and has not pleaded it *puis darrein continuance*, even though the plaintiff has proceeded to judgment, (*Todd* v. *Mansfield*, 3 B. & C. 222; 5 D. & R. 258; *Anon.* Lofft, 651. But a different rule has obtained in *Common Pleas*; *Clarke* v. *Hoppe*, 3 Taunt. 46; 1 Rose, 353; *Humphreys* v. *Knight*, 6 Bing. 569; 4 M. & P. 370.) So where the defendant is discharged under the Insolvent Act, (—— v. *Bruce*, 2 Chit. R. 105), or has been sent out of the kingdom under the Alien Act (see *Folkein* v. *Critico*, 13 Ea. 457); or is a convicted felon, and sentenced to transportation (*Wood* v *Mitchell*, 6 T. R. 247); or has become a peer (*Trinder* v. *Shirley*, 1 Doug. 45); or a member of the House of Commons (*Langridge* v. *Flood*, Tidd. Pr. 290, 9th ed., cited 4 Ea. 190; *Phillips* v. *Wellesley*, 1 D. P. C. 9,) and the like.

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is apprehended; it is not sworn that the bail intend to render their principal; and it can never be presumed that it was meant to deprive a plaintiff of the security of bail. The cases where the Courts have relieved bail, on the ground of the principal having obtained a certificate of bankruptcy, stand upon a very different footing; for in such case the bankrupt is *actually discharged from the debt.* As to the affidavit sworn on the part of the plaintiff, it would have been sufficient to authorize a judge to order a defendant to be held to bail in an action of *tort*, and is therefore sufficient in the present case (*c*). If the Court uphold the present order, they will next be required, where money has been paid into Court in lieu of bail, to order it to be paid out to the defendant.—[*Coltman*, J.—In that case there is no possibility of putting the defendant in custody.]—But the plaintiff's security would not be more lost to him in that case than in the present.

TINDAL, C. J.—This application involves two points; the first, of a very general character, namely, whether the Court or a judge has power to make the order in question; the second, of a particular nature, depending on the circumstances of this individual case; namely, whether the affidavit sworn on the part of the plaintiff shews a probable cause for detaining the defendant.

The first is a point of considerable importance, and if I entertained any reasonable doubt upon it, I should wish to delay our decision till we might have an opportunity of consulting the other judges on the subject. It is argued, for the plaintiff, that where a party has been arrested and is out on bail, that the authority given by the seventh section of the Act does not apply. This again involves two considerations: first, where a defendant is actually rendered to prison by his bail, whether the Court has authority to order his discharge; secondly, supposing him not to be committed to custody, whether the Court, by the equitable jurisdiction of the Statute, has power to relieve the bail. As to the first of those cases it might, indeed, be said, that it hardly falls within the strict letter of the seventh section, as the party is not in actual bodily "custody" "at the time appointed for the commencement of the Act," although he is committed to such custody afterwards; but I think it is clear that he would be entitled to his discharge under that section, as it is the manifest object and intention of the legislature that thenceforward there should be no imprisonment on *mesne* process. I am not, indeed, prepared to say, that the word "custody" might not be fairly interpreted to mean the friendly custody of the bail, in which, according to the theory of the law, a defendant, who is out upon bail, is supposed always to remain (*d*); but it is not necessary to resort to that construction here; for it would be strange indeed to say that one set of persons, who had been in custody before a particular day, should be discharged, while others, who were committed afterwards, should be detained. I think, therefore, for this reason, that it is within the manifest intention of the Act, that a party rendered by his bail after the 1st of *October*, should be entitled to his discharge; we have nothing to

(*c*) The affidavit to hold a defendant to bail for an assault, as given in *Chit. Forms*, 37, states, that the deponent "*hath been informed, and verily believes*, that the said defendant will *soon* depart this realm, and that he will remain there (?) for some years; and that unless he shall be held to bail, this deponent may be deprived of that remedy to which he is entitled."

(*d*) See 3 Bl. Com. 290.

do with the policy of the Act, but we are bound to give full effect to the intention of the legislature. This brings me to the second consideration, namely, to the case of a defendant out upon bail, at the time when the new Act came into operation. The bail are the guardians and keepers of the defendant, and it would be strange to say that they may not have the benefit of an *exoneretur*, when they clearly have the power to surrender the defendant to prison; it makes no difference, as it appears to me, whether the application is made by the bail, or by the defendant, as it is advisable to save the expence of a circuitous application. The case has a direct analogy with those cases of bankruptcy which have been alluded to; the first case upon that subject appears to be *Ray* v. *Hussey* (*e*); and it has been the universal practice since to exonerate the bail, where the defendant, pending the action, has become a bankrupt and obtained his certificate, although he was not committed to prison; the reason given in that case for such proceeding is, that it was "introduced to discharge the bail in a summary way, without putting them to the trouble and charge of surrendering the principal as formerly;" and I can see no palpable distinction between that case and the present, except that here there is a condition that the defendant, upon being discharged, must enter a common appearance. Upon the general question, therefore, I am of opinion, that the judge had authority to order an *exoneretur* to be entered upon the bail-piece.

The second point, as to the sufficiency of the affidavit produced before the judge, depends upon the construction of the third section; for the seventh section provides that a prisoner may be detained "by virtue of any such special order as aforesaid," which throws us back to the third section, to see how such order may be obtained. (His lordship here read the third section.) It appears to me, therefore, that an affidavit to obtain an order for detention, or for a new arrest, ought distinctly to state the deponent's belief that the defendant is "about to quit *England* unless he be forthwith apprehended," and then proceed to shew the facts raising a probable cause for such belief. Upon this view of the case, the affidavit here is not sufficient; and, upon the whole, I think, therefore, this rule must be discharged, but without costs.

VAUGHAN, J.—I am of the same opinion, though I have felt some difficulty in the progress of the argument. I agree that the Act should be liberally construed, and that we have nothing to do with its policy. Upon the equity of the Statute, I am of opinion that jurisdiction was given to a judge to make the order in question; and that it is for him to determine whether probable cause for arresting or detaining a defendant has been made out. The deponent here states that he believes the defendant was about to go back to *Ireland*, and if the words "unless he be forthwith apprehended" had been added, I should have thought the facts disclosed by the affidavit would have been sufficient to raise such a belief. It is extremely advisable, however, to pursue the very words of the Act. I agree that the rule ought to be discharged.

BOSANQUET, J.—I concur in opinion that the rule ought to be discharged. I think it is our bounden duty to carry this Act into effect in the spirit in

(*e*) Barnes, 104.

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which it was enacted by the legislature. Upon the first and general question, I think that, if a defendant is out on bail upon *mesne* process, the Court may relieve the bail, where they are entitled to render their principal, in order to avoid circuity and expence. The seventh section, which speaks of a party being "in custody" "at the time appointed for the commencement of the Act," does not mean only parties that are in custody *on that particular day;* it must mean *when this Act shall have come into operation*, and is equivalent to the expression *on or after the 1st of October*. It is not necessary to determine the meaning of the word *custody*, though I should be disposed to hold that a party out upon bail was, in law, in the custody of his bail; it is observable that the expression is not "in prison," and that the 35th section of the Act, which refers to the proceedings in the Insolvent Court, speaks of "any person who shall be *in actual custody within the walls of any prison*." I think, therefore, that if the bail are entitled to render the defendant, the Court ought to take the same course that they would in the case of a defendant becoming bankrupt, and to discharge the bail. Then, as to the affidavit, the expression that the defendant is "*about* to return to *Ireland*," is extremely vague and general; it may mean *immediately*, or *in a week*, or *a month;* but the legislature have added the terms, "unless he be *forthwith* apprehended," shewing the necessity of an immediate arrest. I think, therefore, that a plaintiff who seeks either to arrest or detain a defendant, ought to pledge his belief that the party is about to leave *England, unless he be forthwith apprehended;* and to state the facts from which *a probable cause* for such a belief may appear. That an early arrest was contemplated by the legislature may, I think, also be inferred from the form of the *capias* given at the end of the Act, and the memorandum to be subscribed to it; by which it appears that the writ is to be executed within one calendar month from the date thereof.

COLTMAN, J., concurred.

Rule discharged, but without costs.

Nov. 7.

HANNAH *v.* WILLIS.

The Court refused a rule that a bill of exchange should be given up to the acceptor upon payment of the amount and costs, exclusive of the costs of a particular rule in the cause.

THIS was an action against the acceptor of a bill of exchange; an interlocutory rule having been made in the cause, without order as to costs.

Petersdorff moved for a rule *nisi*, that the bill might be given up to the defendant on his paying the debt and costs incurred, exclusive of the costs of the former rule.

TINDAL, C. J.—You give no reason for the application. The ordinary course is, that the bill should be given up upon payment of the amount, and of the taxed costs of the action; you had better go before the Master first; we do not like to hamper him.

Rule refused.

DAVIES, demandant, LOWNDES, tenant.

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Nov. 7.

The Court will not order a commission to issue for the examination of a witness within the jurisdiction (under 1 W. 4, c. 22), upon the ground of the witness being unable to attend the trial from an accident, without a positive affidavit of that fact.

GRAY moved for a commission to examine a witness on interrogatories, under 1 *W.* 4. c. 22. s. 4 (*a*). The witness was sworn to be eighty-one years of age, and to reside 260 miles from *Westminster* (where this cause was to be tried at bar after next Term), and that, as the deponent had been informed and believed, she had met with an accident, which would prevent her attending the trial. There was no affidavit of any medical man, but it was submitted that it was not necessary, as, by the 10th section of the Act (*b*), the witness's examination could not be used, without proving her non-ability to attend at the trial.

TINDAL, C. J.—The objection to your present application is, that the party gets the examination of a person upon oath, and either uses it or not, as he thinks fit, at the trial. We ought not to extend facilities for such a proceeding. You must, at any rate, produce an affidavit of some one who has seen the witness.

Gray, on a following day, having produced such an affidavit, the Court made the

Rule absolute.

(*a*) Enacting, "that it shall be lawful for each of the Courts at *Westminster*, in every action depending in such Court, upon the application of any of the parties to such suit, to order the examination, on oath, upon interrogatories or otherwise, before the Master of the said Court, or other person to be named in such order, of any witnesses within the jurisdiction of the Court."

(*b*) Enacting, that "no examination to be taken by virtue of this Act shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear, to the satisfaction of the judge, that the examinant is beyond the jurisdiction of the Court, or dead, or unable, from permanent sickness, or other permanent infirmity, to attend the trial; in any of which cases the examinations, certified under the hand of the commissioners, or other person taking the same, may, without proof of the signature of such certificate, be received in evidence, saving all just exceptions."

BROOKES *v.* HUMPHREYS.

Nov. 10.

Semble, that a declaration alleging an eviction as a breach of covenant for quiet enjoyment, ought to state positively that the title of the evictor was not derived from the plaintiff himself.

COVENANT. The declaration stated, that the defendant, by indenture of lease of the 1st of *August*, 1829, demised to *H. W.*, his executors, &c., certain premises for a term not yet expired, covenanting *that he had full power and authority so to demise*, &c., and that *H. W.*, his executors, &c., *paying rent, and duly* performing the covenants in the lease on his and their part to be performed, should peaceably and quietly enjoy, &c.; that *H. W.* entered, and afterwards, during the term, assigned the said term to the

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plaintiff; that the plaintiff entered; that both *H. W.* and the plaintiff duly performed the covenants in the lease. *Breach*, that *the defendant had not full power and authority to demise for the term aforesaid;* but, on the contrary, that he was only interested in the premises for and during the life of one *S. C. Averment*, that *S. C.* died during the said term, and that one *E. C., having then a lawful title* in that behalf, evicted the plaintiff.

Plea, that by the said lease, *H. W.* covenanted to keep the premises in repair, and that the plaintiff, after he entered as such assignee, suffered the premises to be and remain out of repair: concluding with a *verification*.

Demurrer: the marginal note assigned, as a cause of demurrer (independently of some formal objections, which were not material), that the covenants for quiet enjoyment, and to repair, were independent covenants, and that the performance of the latter was not a condition precedent to the plaintiff's right of action for a breach of the former.

Channell, in support of the demurrer, referred to *Boone* v. *Eyre* (*a*), *Ritchie* v. *Atkinson* (*b*), *Storer* v. *Gordon* (*c*), *Stavers* v. *Curling* (*d*), *Dawson* v. *Dyer* (*e*).

Stephen, Serjt., *contrà*, proposed to argue that the declaration was bad, inasmuch as it did not shew that *E. C.*, by whom the plaintiff was evicted, did not derive title from the plaintiff himself.

As this point, however, was not mentioned in the marginal note to the demurrer-book, the case stood over till this Term, leave being given to the plaintiff to amend his declaration without payment of costs. The declaration not having been amended, and the point having been stated in the margin of the demurrer-book,

Channell now urged, in support of the declaration, that, although the objection might have been tenable on *special* demurrer, *Noble* v. *King* (*f*), it was not so upon a *general* demurrer, as in this instance.

But THE COURT having intimated a strong opinion that it ought not to have been left in doubt that the claimant did not derive title from the plaintiff himself; referring to 2 Wms. Saund. 180, c. n. (10) (*g*),

Channell prayed leave to amend, on payment of costs, which was granted.

(*a*) 1 H. Bl. 273, n; S. C. (in error) 2 W. Bl. 1312; S. C., cited 6 T. R. 573.
(*b*) 10 Ea. 295.
(*c*) 3 M. & S. 308.
(*d*) 2 Hodg. 237; 3 N. C. 355; 3 Scott, 740.
(*e*) 5 B. & Ad. 584; 2 N. & M. 559. See also 1 Wms. Saund. 320, c. n.
(*f*) 1 H. Bl. 34.
(*g*) The passage referred to is a note to the case of *Wotton* v. *Hele* (2 Saund. 177), that was an action of *covenant*, stating that a fine, *sur concessit*, was levied between the plaintiff and the defendant and her late husband, whereby (*inter alia*), the latter warranted the tenements to the plaintiff *against all men*, for a certain term; alleging as a breach, that, after entry, one *H. S.* "having a lawful right and title, &c.," entered and ejected the plaintiff. "This case," observes the commentator, has

ever since been considered as a leading authority to shew that it is necessary that the plaintiff should state in his declaration, in some manner, that the person evicting had a lawful title *before or at the time of the date of the grant to the plaintiff*, and that an averment that he had a *lawful title*, without this qualification, is too general, and bad after verdict; for it will be intended that the title of the person entering is derived from the plaintiff himself;" and, after citing various authorities in support of this proposition, he proceeds, (p. 181, a,) "But in an action of covenant, that *the grantor has good right, full power, and lawful authority to grant*, it is held that the breach may be as general as the covenant, namely, *that he had not good right, full power, and lawful authority to grant*, without stating any eviction or interruption:" and *Bradshaw's Case* (9 Rep. 60, b., Cro. Jac. 304); *Lancashire* v. *Glover* (2 Show. 460); *Muscot* v. *Ballet* (Cro. Jac. 369); *Glinster* v. *Audley* (T. Raym. 14), are cited. In the principal case it will be observed that the plaintiff not only alleges the breach in the words of the covenant, but does proceed to state an eviction: but *quære*, was not this latter statement surplusage?

PRICE *v.* LINSTEAD.

Nov. 26.

An attestation of a *cognovit* on the part of the defendant, by *F.*, an attorney, who acted as attorney for the plaintiff's son, a clerk in the office of *H.*, the plaintiff's attorney, and who afterwards indorsed the *cognovit* "*F.* for *H.*," *held* insufficient.

THE defendant (a female) gave a *cognovit* in this action; it was executed in the presence of the plaintiff's son (a clerk in the office of *Hopkins*, the plaintiff's attorney in the action), and of *Foulk* (the attorney for the plaintiff's son). *Foulk* attested the *cognovit* as follows:

"Attorney for the defendant, expressly named by her and at her request; and I declare myself to be her attorney, and to sign my name as such."

The *cognovit* was endorsed "*Foulk* for *Hopkins*."

White had obtained a rule *nisi* to set aside this *cognovit*, on an affidavit by the defendant setting forth the foregoing facts, and stating that *Foulk* did not attend on her request.

R. V. Richards contended that the attestation was sufficient to satisfy the provisions in the Imprisonment for Debt Act (1 & 2 *Vic.* c. 110) (*a*); and he produced an affidavit by *Foulk*, denying that he acted in any way as agent for *Hopkins*.

White was heard in support of the rule.

TINDAL, C. J.—The 10th section of the Act shews what was meant by the legislature; it is clear it was intended that defendants should be protected. One of the requisitions of the Act is, that upon the execution of any *cognovit*,

(*a*) Sec. 9 enacts, "that no warrant of attorney or *cognovit* given by any person shall be of any force unless there shall be present some attorney of one of the superior Courts on behalf of such person, *expressly named by him and attending, at his request*, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney. Sec. 10 enacts, "that a warrant or *cognovit* not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did, in fact, understand the nature and effect thereof, or was fully informed of the same."

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there "shall be present some attorney on behalf of the person executing, expressly named by him, and attending at his request;" the question here is, whether *Foulk* was an attorney named by this defendant, and attending at her request; and it seems to me impossible to say that he was such an attorney as was intended by the legislature; for he is not only connected with the plaintiff's son before the *cognovit* is given, but connects himself too much afterwards with the plaintiff's attorney, by the endorsement on the *cognovit*.

BOSANQUET, J., referred to *Hutson* v. *Hutson* (*b*), *Walker* v. *Gardner* (*c*), and *Todd* v. *Gompertz* (*d*).

Rule absolute.

(*b*) 7 T. R. 7.
(*c*) 4 B. & Adol. 371.
(*d*) 1 Will. Woll. & Hodg. 69; 6 D. P. C. 296.

Nov. 26.

PORAS *v.* WILKINS.

A defendant, taken in execution on the 27th of *November*, for a debt under 20*l.*, is entitled to his discharge on the 26th of *November*, in the following year, being the last day of Term.

THOMAS, on this day (being the last of the Term), applied for the defendant's discharge, under 48 *G.* 3, c. 123, s. 1 (*a*), upon an affidavit stating that he had been taken in execution on the 27th of *November*, 1837, for a debt under 20*l.*, and had lain in prison ever since; and that the plaintiff had been served with notice of the application ten days ago (*b*).

Rule granted.

(*a*) Enacting "that all persons in execution upon any judgment for any debt or damages not exceeding 20*l.*, exclusive of costs, and who shall have lain in prison thereupon for *twelve* successive *calendar months*, shall and may, upon application for that purpose *in Term time*, made to some one of his Majesty's superior Courts, be forthwith discharged out of custody as to such execution, by rule of Court."

(*b*) See *R. H.*, 2 W. 4, 90

Nov. 26.

INGRAM *v.* BLIGH.

The defendant purchased some bricks to send to *Mauritius*; some of which he examined and approved of previously to their being shipped; upon an action being brought to recover their value, the defendant was allowed to have a commission to examine witnesses at *M.*, upon his paying into Court a sum on account of those bricks which he had approved of.

ASSUMPSIT for bricks sold. Issue was joined on *November* 17th, and the plaintiff had given notice of trial. The defendant had afterwards obtained a judge's order to stay proceedings till a commission should issue to the *Mauritius* (where the bricks had been sent), upon an affidavit that the evidence of certain specified witnesses, resident there, was necessary for the defence.

Byles had obtained a rule *nisi* to set aside this order, upon payment of

costs He produced an affidavit, alleging that the application for the commission was made for the purpose of delay; and that part of the bricks had been examined before they were shipped, and that the defendant had subsequently ordered the remainder. He submitted that the defendant's affidavit was not sufficient to entitle him to a commission, and cited *Lloyd* v. *Key* (*a*).

R. V. Richards shewed cause; he produced a further affidavit, stating that the defence was that the bricks, when they reached their destination, were wholly unfit for use.

Byles, contrà.—There is a clear right of action in respect of those bricks which had been examined and approved of by the defendant, and on account of these he ought, at least, to pay some money into Court.

Per Curiam.—If the defendant will pay 100*l.* into Court in ten days, the present rule may be discharged, otherwise it will be

Absolute.

(*a*) 3 D. P. C. 253.

NORRIS *v.* BIGHTON.

Nov. 26.

THE defendant was arrested on the 6th of *August*. The bail-bond was assigned, and an action commenced upon it on the 31st of *October*.

The Court, since the *Imprisonment for Debt Act*, will stay proceedings on the bail-bond, and order it to be cancelled, upon an appearance being entered in the original action, on the application of the defendant in such action, without an affidavit of merits.

Wilde, Serjt., on behalf of the defendant, had obtained a rule *nisi* to stay proceedings on the bail-bond, and that the same should be cancelled upon entering a common appearance in the original action, and payment of costs; his affidavit stated that no appearance had been entered in the action on the bail-bond.

Kelly, Q. C., shewed cause.—By his affidavits, it was shewn that an appearance in the action on the bail-bond had since been entered. He contended that, as the defendant did not produce an affidavit of merits, he was not entitled to the relief he sought.

Wilde, contrà.

TINDAL, C. J.—This case falls within the principle upon which the Courts have been acting since the passing of the Imprisonment for Debt Act (1 & 2 *Vict.* c. 110). The question is, how we should deal with the defendant if he were actually in prison; and there is no doubt that we should order him to be discharged without requiring any affidavit of merits.

Rule absolute.

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Nov. 26.

Practice. Delivery of demurrer-books. Suspending judgment on demurrer upon terms.

FRYER *v.* SMITH.

THE plaintiff in this case having demurred, his attorney delivered two demurrer-books to the judges, and gave notice thereof to the defendant's attorney, who, having omitted to deliver demurrer-books to the other two judges, the plaintiff's attorney delivered them also; whereupon

Arnold, on the day on which the demurrer stood for argument (*November* 21st), no one appearing on behalf of the defendant, prayed for, and obtained judgment for the plaintiff.

Miller, on behalf of the defendant, now applied to have the demurrer restored to the paper; he produced an affidavit of the defendant's attorney, stating that he was not served with notice to deliver his demurrer-books till after dusk on the 16th of *November*.

TINDAL, C. J.—If the defendant is willing to bring the money into Court, we will suspend the judgment for one week, to give him an opportunity of so doing; and in that case the demurrer may be restored to the paper.

Rule accordingly.

Nov. 26.

A demurrer to a declaration against the acceptor of a bill, stating that it was drawn and indorsed by *T.* for *B.* & *Co.*, having been set aside as frivolous by a judge's order, such order was rescinded, and the cause ordered to stand at the head of the demurrer paper.

DAWSON *v.* PERRY.

THE declaration against the acceptor of a bill of exchange, stated, that it was drawn and indorsed by *J. T.* for *B.* & *Co.* *Demurrer*, upon the ground that the declaration did not state that the bill was drawn or indorsed by *J. T.* as agent for *B.* & *Co.*, or by procuration. A judge's order having been obtained to set aside this demurrer as frivolous,

Ball now applied for a rule to rescind this order, and contended that the demurrer was a *bonâ fide* one.

Wilde, Serjt., shewed cause in the first instance.—The bill having been drawn in that form, was authenticated by the defendant's acceptance.

Ball, in support of the rule.—Although the acceptance might authenticate the drawing the bill in that form, it gave no authority to indorse.

TINDAL, C. J.—The rule may be made absolute; but let the case stand at the head of the demurrer paper for next Term.

Rule absolute, accordingly.

FITZJAMES *v.* LUSH.

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Nov. 26.

An action having been commenced by *capias*, the Court refused to give directions that it might be continued by *summons*.

THE action had been commenced by *capias*, but the defendant had not been arrested.

Fitzjames applied for a rule to direct the officer to continue the writ by a writ of summons, as by sec. 2 of the Imprisonment for Debt Act (*a*), the writ of *capias* is virtually abolished.—[*Bosanquet*, J., referred to *Lush's* Treatise on the Act, where a doubt is raised as to the course to be pursued in such a case.]

TINDAL, C. J.—The Court cannot advise one side what course to take.

Rule refused.

(*a*) 1 & 2 Vict. c. 110, enacting "that all personal actions in the superior Courts shall be commenced by writ of summons."

DAY *v.* CLARKE.

Nov. 26.

The defendant was arrested for 347*l.*, upon an architect's bill; there was conflicting evidence as to the value of the work done, and the plaintiff recovered only 211*l.*:—*Held*, the defendant was not entitled to his costs under 43 G. 3 c. 46.

ASSUMPSIT for work and labour, as an architect and surveyor, with a count for goods and materials. The defendant was arrested for 347*l.* The cause was referred, and the arbitrator awarded the plaintiff only 211*l.*

Andrews, Q. C., had obtained a rule *nisi* to tax the defendant his costs under the Stat. 43 *G.* 3, c. 46, s. 3 (*a*). His affidavits stated that the plaintiff had been employed to erect a building out of buildings partly new and partly old, and that he had undertaken that the expence should not exceed 3000*l.*, but that he had charged 5*l. per cent.* commission on 5000*l.*; there were also charges for materials, amounting to about 40*l.*, which were admitted to be due.

Wilde, Serjt., shewed cause.—The *onus* was on the defendant to shew the absence of probable cause for arresting him to the larger amount, *Fountain* v. *Young* (*b*); where there is a real contest between the parties, the verdict is not the test of want of probable cause, *Graham* v. *Beaumont* (*c*), *Clare* v. *Cook* (*d*). His affidavits shewed that the evidence as to the value of the plaintiff's work, was very conflicting; two of his witnesses having sworn that it was more than the amount of the bill delivered.

(*a*) Enacting, "that in all actions wherein the defendant shall be arrested, and the plaintiff shall not recover the amount for which the defendant shall have been so arrested, such defendant shall be entitled to costs of suit, provided that it shall appear, to the satisfaction of the Court, upon hearing the parties by affidavit, that the plaintiff had not any reasonable or probable cause for causing the defendant to be arrested in such amount."

(*b*) 1 Taunt. 60.

(*c*) 5 D. P. C. 49.

(*d*) *Ante*, 81; 4 N. C. 269; 5 Sc. 698.

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Andrews and *Byles*, in support of the rule.—The award, which is tantamount to a verdict, is *primâ facie* the test of the sum for which the plaintiff had probable cause to arrest the defendant; at least, it has changed the *onus* of the proof, and thrown it upon the plaintiff to shew that he *had* cause for arresting the defendant in so large a sum; *Van Neuvel* v. *Hunter* (*e*), *Twiss* v. *Osborne* (*f*), *Ballantyne* v. *Taylor* (*g*). The plaintiff must have known he had no evidence to support his disputed claim, and that will entitle the defendant to his costs, *Griffiths* v. *Pointon* (*h*), *Robinson* v. *Whitehead* (*i*). They also cited *Summers* v. *Grosvenor* (*j*), and *Tipton* v. *Gardner* (*k*).

TINDAL, C. J.—The present case does not, in my opinion, fall within the operation of the Statute; by which the question for our consideration is, whether the defendant has made it appear to our satisfaction that the plaintiff had not any reasonable or probable cause for arresting the defendant for 347*l*. Now, it seems there was much conflicting testimony as to the value of the plaintiff's work; the arbitrator has found against the plaintiff for a considerable portion of his claim, and there is no reason to dispute the propriety of that finding; but we are trying a very different question; namely, whether we are satisfied that the plaintiff had no probable cause for arresting the defendant for the larger amount, and I cannot say that it is made out to my satisfaction.

VAUGHAN, J.—Where there is a great disproportion between the sum for which the defendant was arrested, and that recovered by the verdict, it is certainly a strong *primâ facie* reason that the arrest was made for the former sum without probable cause; but that does not appear to be the case here.

BOSANQUET, and COLTMAN, Js., concurred.

Rule discharged.

(*e*) 1 Har. & Woll. 273.
(*f*) *Ib.* 274, n.; 4 D. P. C. 107.
(*g*) 2 Har. & Woll. 453; 5 A. & E. 792; 1 N. & P. 219.
(*h*) 2 N. & M. 675.
(*i*) 1 Will., Woll. & Hodg. 67; 6 D P. C. 292. See also *Nicholas* v. *Hayter*, 4 N. & M. 882; 2 A. & E. 248.
(*j*) 2 C. & M. 341; 4 Tyr. 222; 2 D. P. C. 224.
(*k*) 4 A. & E 317; 5 N. & M. 424.

Nov. 9.

DOE *v.* ROE.

Practice. Ejectment.

EJECTMENT. There were several tenants in possession, all of whom had been served, but upon serving the last, it was discovered that his name was wrongly spelt, and it was altered with his consent.

Wilde, Serjt., under these circumstances, obtained a rule for judgment against the casual ejector, the service upon the former being deemed good.

DOE, d. DICKENS *v.* ROE.

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Nov. 12.
Practice. Ejectment. Chapel

A CHAPEL of ease was erected, under a private Act of Parliament, at *Hove*, in *Sussex*, by Dr. *Everard*, in whom the right of presentation was vested for forty years. Dr. *E.* having absconded, an ejectment was brought by the trustee of the chapel, and a copy of the declaration was served at Dr. *E.'s* residence upon his gardener; also upon Dr. *E.'s* wife, at her residence; also on the clerk, who had the custody of the keys; and another copy was affixed to the notice board of the chapel. Under these circumstances,

Peacock obtained a rule for judgment against the casual ejector.

INGRAM *v.* LAWSON.

Nov. 14.

Declaration for a libel, in stating of plaintiff's ship that she was leaky and had been sold to the Jews to carry out convicts: *Plea*, to the whole declaration, justifying that the ship was leaky only, *held* ill.

CASE for a libel published in the form of a letter in the *Times* newspaper. The declaration stated that the plaintiff was the owner of a certain ship, which was sea-worthy, and was going on an outward voyage; that the defendant, for the purpose of causing it to be suspected that the said ship was unseaworthy, and not fit for the reception of passengers of respectability, published of and concerning the said ship that she was leaky, and that during a previous voyage she had been pumped every two hours, and that she had been sold to the Jews to send out convicts.

Third plea, pleaded to the whole of the declaration, containing a justification that the ship was leaky, and that, during a previous voyage, she had been pumped every two hours. *Demurrer.*

J. Henderson was to have argued in support of the demurrer, but the Court called on

Humfrey, to support the plea.—He contended, that it was an answer to the only material part of the alleged libel; and that it was no libel to say a ship was sold to Jews to send out convicts.

TINDAL, C. J.—It would not provoke parties to take berths in the vessel. Suppose it had been said that she was full, that would have prevented people from taking berths; and a statement that she had been sold for the purpose of carrying out convicts, would certainly have the effect of deterring respectable people from going out by such a ship. The plea professes to be an answer to the whole libel, and only justifies part. There must be

Judgment for the plaintiff.

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Nov. 15.

WATSON *v.* REEVE.

Where a cause was taken as undefended, owing to the defendant's attorney having omitted to deliver briefs to counsel, the defendant being present at the trial, and the verdict being for 7*l.*, the Court refused a new trial on any terms (*a*).

TROVER for a gun. The cause stood No. 9 in the cause-list for *Saturday*, *November* 10; and, about 20 minutes before 11 o'clock in the morning, it was called on in its turn, when, no one appearing for the defendant, it was taken as undefended, and the verdict passed for the plaintiff. At 11 the defendant's attorney came to Court with a brief for counsel for the defence.

Gray, who produced an affidavit of merits, had obtained a rule *nisi* for a new trial upon payment of costs by the defendant's attorney, as between attorney and client, upon the authority of *De Ronfiguy* v. *Peale* (*b*).

Humfrey shewed cause.—It appeared, from his affidavits, that the defendant himself was present at the trial, and that the verdict was only for 7*l.*

Gray, in support of the rule, contended that this was not so strong a case as *De Ronfiguy* v. *Peale*, for there the cause stood first in the list, and yet the Court allowed a new trial, upon the terms he now proposed.

TINDAL, C. J.—If we had known that the sum was so small as 7*l.*, we should not have granted the rule; there would be great danger in allowing a defendant to have a new trial, after he has heard all the evidence on the other side, and may have been put up to a defence.

VAUGHAN, J.—It does not appear that the game is worth the candle.

Rule discharged.

(*a*) See *Breach* v. *Casterton*, 7 Bing. 224; 4 M. & P. 867; *Gwilt* v. *Crawley*, 8 Bing. 144; 1 Mo. & S. 229, *Acc.*

(*b*) 3 Taunt. 484.

Nov. 22.

MOODY *v.* MORGAN.

Distringas to compel an appearance granted where the defendant's residence was unknown, upon its appearing he had received the writ.

ARNOLD moved for a *distringas* to compel an appearance, upon an affidavit, stating that the defendant had left his former residence; that there had been several unsuccessful attempts to find him out; that a copy of the writ of summons was sent on the 9th of *November*, in a letter by the post to the defendant's attorney, who wrote in answer, acknowledging the receipt, and saying they had no instructions to appear, but that they were prepared to defend the action; that a letter from the defendant was afterwards received by the plaintiff's father, in which he alluded to the writ, and complained of the action having been granted: the affidavit proceeded to state that no appearance had been entered, and that the deponent believed the defendant was keeping out of the way to avoid service.

Rule granted.

DAWES *v.* SALOMONSON.

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Nov. 15.

Proceedings on a bail-bond stayed upon terms, where there had been a former action and verdict against one of the bail.

THIS was an action against one of three bail. The defendant, in the original action, was arrested on the 19th of *May*. The bail-bond was executed on the 21st, but special bail was not perfected. On the 19th of *June*, a declaration, *de bene esse*, was filed in the original action, *venue, Surrey;* the 23d of *July*, being the commission day for that county. On the 27th of *June*, the bail-bond was assigned, and an action was commenced against *S. G. S.*, one of the bail, who pleaded *non est factum;* the cause was tried at *Guildford*, and the plaintiff had a verdict. On the 25th of *September*, the present action, and another, against the third bail, were commenced.

Gurney had obtained a rule *nisi* to stay the proceedings; against which

Petersdorff shewed cause; he stated, from his affidavits, that the present action had been brought owing to the inability of the other bail to pay the debt and damages, and that a trial had been lost in the original action.

But THE COURT made the

Rule absolute on payment of costs in a fortnight; the bond and verdict being to stand as a security.

GRANT *v.* STONEHAM and another.

Nov. 15.

Practice. Service of rule to compute.

WILSON moved for a rule absolute to compute on a promissory note, a copy of the rule *nisi* having been served on one of the defendants, and the original on the other, from whom the plaintiff's attorney afterwards obtained it back.

Rule absolute.

FLIGHT *v.* HARBART

Nov. 20.

Distringas granted where, after previous calls, there had been two on the same day, the second by appointment (*a*).

SHEE moved for a *distringas;* there had been several calls previously to the 7th instant; on that day two calls were made, the second by appointment; the third call was next day by appointment, when the copy of the writ was left.

Rule granted.

(*a*) See the next case.

Common Pleas.

Nov. 20.

Distringas refused where all the three calls were on the same day (*a*).

FENTON *v.* HILL.

BRAMWELL moved for a *distringas*; the three calls had all been on the same day, the two last by appointment. It appeared further, that the defendant's wife had told the party that it was no use calling; that the defendant was keeping out of the way, and would not be served. He cited *Hickman* v. *Dallimore* (*b*), where a *distringas* was granted, though two of the calls were not made according to previous appointment (*c*).

Rule refused.

(*a*) See *Cross* v. *Wilkins*, 1 Har. & Wol. 516; 4 D. P. C. 279; *Clayton* v. *Marsham*, Will. Woll. & Dav. 210; 5 D. P. C. 542.

(*b*) 1 Har. & Wol. 524; 4 D. P. C. 278.

(*c*) See also *White* v. *Western*, 2 D. P. C. 451.

Nov. 21.

PILMORE *v.* HOOD.

In *case* for misrepresentation as to the value of a public-house, the *declaration* stated that the defendant made the false representation to *B.*, upon a treaty for the sale of the lease between them; that this treaty went off; that it was afterwards agreed between plaintiff, defendant, and *B.*, that the former should become the purchaser in the room of the latter; that *B.* at that time communicated defendant's representation to plaintiff, *whereof defendant had notice*; and that plaintiff afterwards, confiding in such representation, agreed to become the purchaser.

CASE. The declaration stated, that by a lease, bearing date the 25th of *September*, 1819, made between the Rev. *J. A.*, clerk, and others, of the one part, and *R. S.*, of the other part, they, the said *J. A.*, &c., did demise unto the said *R. S.*, his executors, &c., all that messuage, &c., then used or occupied as a public house, to hold the same for the term of twenty-nine years, &c; that, by divers mesne assignments, the lease and premises afterwards and before the committing of the grievances, &c., to wit, on the 1st of *February*, 1836, had become vested in the defendant for the residue of the term, and the defendant then carried on the trade or business of a publican and licensed victualler, at the said messuage and premises: and whereas afterwards and before the committing of the grievances hereinafter mentioned, to wit, on the same day and year last aforesaid, one *R. Bowmer* had contracted and agreed with the defendant for the absolute purchase of the said lease at and for a certain price, to wit, 1175*l.*, but no assignment thereof had been made to him, the said *R. B.*; and the said defendant, at and before the making of the said agreement with the said *R. B.*, falsely, fraudulently, and deceitfully pretended and represented to the said *R. B.*, that the trade of the said public-house had been and then was 180*l.* per month, all retail, over the counter: and whereas the said *R. B.*, not being able to complete the said purchase, it was afterwards, to wit, on the same day and year last aforesaid, agreed, by and between the said plaintiff, the said *R. B.*, and the said defendant, that *the plaintiff should become the purchaser* of the said premises *in the room and stead of R. B.*; and at and before the making of the said last-mentioned agreement, the said *R. B.* communicated to the plaintiff

Plea, that defendant did not authorize *B.* to communicate the representation to plaintiff:—*Held*, *first*, that the declaration disclosed a sufficient cause of action; and *secondly*, that the plea was no answer.

that the said defendant had, at and before the making of the said first-mentioned agreement with him, the said *R. B.*, pretended and represented to the said *R. B.* that the trade of the said public-house had been and then was 180*l.* per month, all retail, over the counter, *of all which the defendant, at and before the making of the agreement secondly above-mentioned, had notice.* And the plaintiff saith that he, the plaintiff, confiding in the said representations so made by him, the defendant, as aforesaid, then agreed to become the purchaser of the said premises for 1175*l.*, in the room and stead of the said *R. B.*, and the plaintiff afterwards, to wit, on the same day and year last aforesaid, paid the said sum. *Allegation*, that the representation was wholly false; *special damage.*

Plea, that *defendant did not authorize* R. B. *to communicate to the plaintiff* that the defendant had pretended and represented to *R. B.* that the trade of the said public-house had been, and then was, 180*l.* per month, &c., in manner and form, &c., concluding with a *verification.*

Demurrer, that it is not averred in the declaration that the defendant did authorize *R. B.* to communicate to plaintiff that defendant had pretended and represented to *R. B.* that the trade of the said public-house had been, and then was, worth 180*l.* per month, &c., and that it is not necessarily understood, intended or implied that such an averment is contained in the declaration, and that it is not necessary to the maintenance of the action that the declaration should contain such an averment, and that the said plea amounts to an immaterial traverse, &c.

Stammers, in support of the demurrer.—Both deceit and damage to the plaintiff concur in this case, whereby he has a right of action; *Com. Dig.* "*Action upon the case for a Deceipt*" (A. 1), *Pasley* v. *Freeman* (*a*). The deceit here consists in the fact that the defendant had *notice* of *Bowmer's* misrepresentation, and did not repudiate it; and the maxim, *qui tacet consentire videtur*, which obtains in equity, will apply to such a case as the present, *Hunsden* v. *Cheney* (*b*), and other cases collected in *Bac. Abr.* "*Fraud*" (B), *Hill* v. *Gray* (*c*).

Then the plea is bad in form as well as in substance; it traverses a matter which is not alleged, and that cannot be done. He cited 1 Wms. Saund. 312 d. n. (4).—[*Tindal*, C. J.—But it is not pleaded as a traverse; it introduces new matter, and ends with a verification; the passage cited is all very good law, but it is not *ad rem.*]

Warren, contrà.—The declaration is bad in substance; or, if that be good, then the plea contains a good answer to it. The declaration does not state on what terms the plaintiff was to become a purchaser, and the contract might have been different from the one entered into with *Bowmer.* It is admitted on the record, that the defendant gave no authority to *Bowmer* to make the statements to the plaintiff, and the defendant cannot be made answerable for a spontaneous representation made by a third party, over whom he had no control, *Ward* v. *Weeks* (*d*). The plea amounts to a denial of

(*a*) 3 T. R. 51, and see 2 *Smith's Leading Cases*, 55.
(*b*) 2 Vern. 150.
(*c*) 1 Star. N. P. C. 434.
(*d*) 7 Bing. 215; 4 M. & P. 796.

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the notice. In order to give a party a right of action for false representation, it must not only be false, but it must be made with the intention of being acted upon, *Pasley* v. *Freeman* (*e*), *Langridge* v. *Levi* (*f*). In *Dobell* v. *Stevens* (*g*), which is something like the present case, the false representation had been made by the defendant himself. Besides, the damage to the plaintiff here is too remote, and it is not the legal and natural consequence of the defendant's representation to *Bowmer*, *Vicars* v. *Wilcocks* (*h*).

Stammers, in reply, was stopped by the Court.

TINDAL, C. J.—The main question in this case is, whether there is a substantive fraud stated on the face of the declaration; and I think that the plaintiff has sufficiently shewn a fraud, for which, by law, he has a right to recover. The statement amounts to this: that the defendant made a false representation of the value of certain premises to *Bowmer*, in a treaty for the sale of the lease; that *Bowmer* communicated this representation to the plaintiff, and then comes the important allegation, that *the defendant had notice* of this communication, and, after such notice, he completes a contract of sale with the plaintiff. Now, I think this a sufficiently substantive allegation of fraud. It is argued, on the part of the defendant, that it does not appear that the contract with the plaintiff, and the contract with *Bowmer*, were made upon the same terms, but I cannot, myself, read the declaration with that understanding; it is alleged that, after *Bowmer* had contracted and agreed with the defendant for the purchase of the lease, it was agreed between them and the plaintiff that the plaintiff should become the purchaser of the premises *in the room and stead* of *Bowmer*; and I certainly cannot understand that to mean any thing but a transfer of the original agreement. Then, after the defendant had notice of the fraudulent representation, he goes on with the contract with the plaintiff; his object and motive were the same, namely, to obtain a larger sum for the lease; the means employed were the same, namely, the fraudulent representation; and the end was the same: I am unable to distinguish this in principle from a representation made by the defendant himself. *Ward* v. *Weekes* was a very different case; that was an action for slanderous words alleged to have been spoken by the defendant of the plaintiff, whereby one *Bryer* refused to give the plaintiff credit; it turned out, in evidence, that the defendant had spoken the words to one *Bryce*, who had repeated them, as the statement of the defendant, to *Bryer*, who thereupon refused to trust the plaintiff; and this Court decided that the evidence did not support the allegation; but there nothing was done by the defendant after the words had been first spoken by him: here, on the contrary, after the communication of the representation had been made to the plaintiff, with the defendant's knowledge, he goes on with the contract; and he must, therefore, be taken to adopt *Bowmer's* misrepresentation. The concluding words of the judgment in *Langridge* v. *Levi* (*i*), apply to this

(*e*) *Ut supra.*

(*f*) 1 Mur. & Hurl. 134; 2 M. & W. 519.

(*g*) 3 B. & C. 623; 5 D. & R. 490.

(*h*) 8 Ea. 1; and see 2 *Smith's Leading Ca.* 300.

(*i*) That was an action upon a fraudulent warranty of a gun, brought by the plaintiff's father; the declaration alleging that the father bought it for the use of himself and his sons; and the plaintiff having received damage by

case; the Court there says, "We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation, nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over; we decide that he is responsible in this case for the consequences of his fraud, whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased" (*j*). I think, therefore, that the present declaration is sufficient; and also that the plea is insufficient, inasmuch as it does not meet the whole of the allegation in the declaration, by not traversing, or in any way meeting, the averment of notice.

VAUGHAN, J.—I am of the same opinion. Fraud is here sufficiently alleged on the face of the declaration; the averment being, that it was agreed that the plaintiff should stand in the place of *Bowmer*, and that the defendant had notice of *Bowmer's* representation to the plaintiff, *at and before the making of such agreement.* The defendant, therefore, knew of *Bowmer's* communication to the plaintiff; and the question is, whether a party who, having entered into a contract with another, and knowing that the latter has been misled by a misrepresentation, originally proceeding from himself and which he does not contradict, goes on with the contract, is not liable for such misrepresentation. The case of *Hill* v. *Gray* goes further than the present case; there, the agent of a vendor of a picture, knowing that the purchaser laboured under a delusion on a point which the agent thought material to influence the purchaser's judgment, *viz.*, as to the party to whom the picture formerly belonged, having permitted the purchase to be completed without removing that delusion, the sale was held void; although, in that case, there was no actual misrepresentation, either by the vendor or his agent. I think, therefore, there must be judgment for the plaintiff.

BOSANQUET, J.—I am of the same opinion. This is an action for deceit; and the question is, whether, upon the facts stated upon the record, the plaintiff has been fraudulently deceived on a contract of sale. Now, when the facts are stated in the order of time, it appears to me there can be no doubt upon the subject. The defendant enters into a contract with *Bowmer*, at which time he makes a representation that the premises were of certain value, which he knew at the time to be false; afterwards a negociation is entered into between *Bowmer*, the plaintiff and defendant, in which *Bowmer* tells the plaintiff what he had heard from the defendant, not, as it appears, by any authority from the defendant, but it is communicated to the defendant that *Bowmer* had made such representation, or, in the language of pleading, he had notice of it; the declaration then states that the plaintiff, confiding in such representations, entered into the contract with the defendant. Under these circumstances, it is impossible not to see that the defendant's withholding any explanation was as much a deceit, as if he had himself made a fraudulent representation to the plaintiff.

reason of the bursting of the gun, the action on the warranty was held maintainable.

(*j*) 1 M. & H. 140.

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Nov. 22.

PRATT *v.* STARLING.

Rule granted to change the *venue* from *London* to *Worcestershire*, in an action for breach of agricultural covenant in a lease, upon an affidavit that all the witnesses to be examined on both sides resided in the latter county; terms being imposed to prevent the plaintiff being delayed in obtaining judgment.

THIS was an action for the breach of agricultural covenants contained in a lease; *venue, London*. After issue joined,

Roberts obtained a rule *nisi* to change the *venue* to *Worcestershire*, on an affidavit stating that "all the witnesses to be examined, as well on behalf of the plaintiff as on behalf of the defendant, and which witnesses are very numerous," resided in that county.

Blair shewed cause.—The defendant's affidavit should have stated that it would be necessary for him to call witnesses in his defence, *Crompton* v. *Stewart* (*a*). If the Court accede to the application, the plaintiff will be delayed in obtaining judgment. The application should have been made sooner.

Roberts, contrà.—The application could not have been made before issue was joined, *Maude* v. *Sessions* (*b*).

TINDAL, C. J.—It would be very inconvenient to try these causes in *London;* and I think, under the circumstances, this application ought to be granted: to obviate any delay in obtaining judgment, it may be a term of the rule, that if the plaintiff have a verdict, and the judge who tries the cause approve of it, there may be judgment as of the preceding term.

Rule absolute accordingly.

(*a*) 2 C. & J. 473; 1 D. P. C. 567.

(*b*) 1 C. M. & R. 86; S. C. (*nom. Bohrs* v. *S.*), 2 D. P. C. 699. See also *Weatherby* v. *Goring*, 5 D. & R. 441; 3 B. & C. 552; *Parmeter* v. *Otway*, 3 D. P. C. 66; *Youde* v. *Youde*, 1 Har. & Wol. 338; 4 D. P. C. 32. The rule appears to be, that if the application to change the *venue* be made *on the ordinary affidavit* (that the cause of action arose in the county to which it is sought to change the *venue*, and not elsewhere), it must be made *before plea* (*Smith* v. *Walker*, 8 Taunt. 169; 2 Moo. 64; *Wigley* v. *Dubbins*, 4 Bing. 384; 12 Mo. 91); but if it be made on *special grounds* (such as the residence of the witnesses in the new county, or the like), it cannot be made till *after plea*, *Cotterill* v. *Dixon*, 3 Tyr. 705; 1 C. & M. 661; 2 D. P. C. 112); or *after issue*, (*Maude* v. *Sessions, ut supra.*)

Nov. 22.

CORNISH *v.* ROBERTSON.

4th *Jan.*, issue joined; 8th *Feb.*, leave to amend plea, with liberty to plaintiff to postpone trial till sittings after *Easter Term*. Notice of trial countermanded, and new notice given for the sittings during *Trinity Term*. The record was afterwards withdrawn by agreement:—*Held*, this was a waiver of the previous default.

ISSUE was joined on the 4th of *January*. On the 8th of *February*, the defendant took out a summons to amend a plea of set-off, and obtained an order accordingly, on payment of costs, with permission to the plaintiff to

postpone the trial till the Sittings after *Easter Term*; this trial was countermanded; and on the 14th of *May* notice of trial was given for the Sittings during *Trinity Term*. A question having arisen as to the retainer of counsel, it was agreed between the parties that the record should be withdrawn.

Hindmarsh having obtained a rule *nisi* for judgment as in case of a non-suit, upon the usual affidavit,

Butt now shewed cause, and contended that the rule had been obtained against good faith: he cited *Wolsey* v. *Edwards* (*a*).

Hindmarsh, in support of the rule, relied upon *Bainbridge* v. *Purvis* (*b*), and *Smedley* v. *Christie* (*c*), contending that there had been a default in the Sittings after *Easter Term*.

Per Curiam.—There was a subsequent waiver of all that had passed.

Rule discharged, with costs

(*a*) 4 D. P. C. 236.
(*b*) 1 D. P. C. 444.
(*c*) 2 D. P. C. 152.

PETERS *v.* CROFT.

Nov. 26.

DEBT for goods sold. *Pleas: first, nunquam indebitatus; second*, the defendant's discharge under the Insolvent Act. The plaintiff delivered a *similiter* to the first plea, and a *nolle prosequi* to the second; whereupon, the defendant having entered a judgment of *nolle prosequi* to the whole action,

To an action for goods sold, defendant pleaded the general issue, and a discharge under the Insolvent Act. The plaintiff delivered a *similiter* to the first plea, and a *nolle prosequi* to the second. The defendant signed judgment of *nolle prosequi* to the whole action: —*Held* regular.

Godson had obtained a rule *nisi* to set it aside.

Wilde, Serjt., shewed cause.—The second plea goes to the whole cause of action, and the defendant having delivered a *nolle prosequi* upon that plea, there is no issue to be tried; it operates as a discontinuance of the whole action, *Cooper* v. *Tiffin* (*a*). The plaintiff could not have a verdict on the general issue, as upon the record the whole cause of action is answered, *Coke* v. *Sayer* (*b*). The practice is, that the plaintiff delivers the *nolle prosequi* to the defendant, and the defendant enters the judgment thereon (*c*).

Godson, in support of the rule, contended that the judgment was irregular as regarded the second plea.

Per Curiam.—There is nothing irregular in the judgment.

Rule discharged

(*a*) 3 T. R. 511.
(*b*) 2 Burr. 753; 2 Wils. 85. See *Bird* v. *Higginson*, 2 H. & W. 278; *Robinson* v. *Messenger*, 1 W. W. & H. 369; 3 N. & P. 583.
(*c*) The Master, upon being referred to by the Court, certified that such was the practice.

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Nov. 23.

DALTON *v.* GIBB.

The Court refused to enter an *exoneretur* on the bail-piece, where the defendant was in *Scotland*.

HAYES had obtained a rule *nisi* for entering an *exoneretur* on the bail-piece, bail above having been put in in *January* last.

Miller shewed cause; it appeared that the defendant had gone to *Scotland*, where he still remained.

Hayes referred to *Bateman* v. *Dunn* (*a*).

TINDAL, C. J.—That case does not apply here. We cannot see that the bail are in a situation to render the defendant.

Rule discharged: the costs to be costs in the cause (*ex relatione*).

(*a*) *Ante*, p. 368.

Nov. 24.

REECE *v.* MAY.

The defendant having become a bankrupt, the Court set aside an order, that the plaintiffs should deliver particulars of their demand within a certain period, upon payment of costs by them.

ON the 24th of *September* the defendant was arrested at the suit of the plaintiffs (who were assignees of a bankrupt), for 8,000*l.* On the 2d of *October* he was discharged by a judge's order; he afterwards obtained an order that the plaintiffs should deliver the particulars of their demand within a fortnight. Before this period expired, the plaintiffs made affidavit in the Court of Review that the defendant was indebted 17,000*l.* to the bankrupt's estate, according to the bankrupt's books: whereupon, the defendant not having complied with the requisitions of the 8th section of the Imprisonment for Debt Act (1 & 2 *Vict.* 1838) (*a*), a *fiat* was issued against him. In the mean time, ten days after the fortnight, within which the particulars should

(*a*) Enacting that "if any single creditor (or creditors, being partners), whose debt shall amount to 100*l.*, or any two creditors to 150*l.*, or any three or more creditors to 200*l.*, of any trader within the meaning of the laws respecting bankrupts, shall file an affidavit in Her Majesty's Court of Bankruptcy that such debt is due, and that such debtor is such trader, and shall cause him to be served personally with a copy of such affidavit, and with a notice requiring immediate payment of such debt, and if such trader shall not, within twenty-one days after personal service of such affidavit and notice, pay such debt, or secure or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum with two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought for the recovery of the same, together with such costs, or to render himself to the gaoler of the Court in which such action shall have been, or may be, brought, after judgment recovered, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit and notice, provided a *fiat* shall issue within two calendar months from the filing of such affidavit.

have been delivered, another judge's order was obtained for the delivery of particulars by the plaintiff within a fortnight.

Wilde, Serjt., had obtained a rule *nisi* to set aside this order.

Bompas, Serjt., shewed cause.—In *Burgess* v. *Swayne* (*b*), it was held that, after a general order for particulars of plaintiff's demand, with a stay of proceedings till they are delivered, the defendant cannot sign judgment of *non pros.* for not declaring; and that the order should have been to deliver the particulars within a certain time. That was the order that had been obtained in this case, and the defendant could not obtain a *non pros.* if it were changed to a general order for the delivery of particulars.

Wilde, Serjt., in support of the rule.—There is no stay of proceedings in this case, and therefore the defendant or his assignees may obtain *non pros.* The present application has been made in consequence of the bankruptcy of the defendant.

TINDAL, C. J.—There seems no reason why the plaintiff should be forced to go on with his action. The best course will be, to withdraw the present order, giving the defendant the same time to *non pros.* as he has now, namely, till *Hilary Term*; the plaintiffs paying the costs of this application.

Rule absolute accordingly.

(*b*) 7 B. & C. 485.

ALCHIN *v.* HOPKINS, Clerk.

Nov. 26.

A writ of *levari facias de bonis ecclesiasticis* having issued in 1834, the Bishop, in 1838, was ruled to return what sums he had from time to time levied under the writ, he made a return, setting out certain items of receipt and disbursement. Held insufficient, inasmuch as it did not state that the items of receipt were all that had been received, or that the payments had been actually made.

IN *June*, 1834, a writ of *levari facias de bonis ecclesiasticis*, was issued at the suit of the plaintiff, addressed to the Bishop of *Winchester*, to levy 354*l.* 10*s.*, and costs. In last *Easter Term* a rule was made absolute, calling upon the Bishop to return what sums had been from time to time levied under the writ; whereupon he made a return, setting out all the items of receipt and expenditure from 1834 to the end of 1837, whereby it appeared that the expenditure (including 150*l.* paid at various times to the plaintiff), exceeded the receipts by about 15*l.* or 16*l.*

Peacock had obtained a rule *nisi*, calling upon the Bishop to make a better return, upon the ground that it did not state that the items mentioned were all that had been received, or that the alleged payments had actually been made.

Bere shewed cause.—The return is sufficient. From a note by Serjt. *Hill*, to *Burns' Ecc. Law*, Title *Sequestration* (8th edition), it appears it would have been sufficient if the Bishop had simply returned that he had

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sequestered the defendant's ecclesiastical goods (*a*), and *à fortiori*, this is a sufficient return which gives the items.

(*a*) In this edition of *Burns*, after stating that, upon a *fi. fa.* being directed to the sheriff, and a return that the defendant is a clerk having no lay fee, a *fieri*, or *levari*, *facias* is directed to the bishop to levy the debt, &c., of his ecclesiastical goods, it is added "or a *sequestrari facias* may be issued for the same purpose." It is to this passage (for which no authority is cited), that the note of Serjt. *Hill* is appended. The learned Serjeant cites the opinion of *North*, C. J., as given in *Walwyn* v. *Awberry* (1 Mod. 260), which is as follows: "The bishop is in the nature of an ecclesiastical sheriff. If an action of debt were brought against a clerk, and the sheriff had returned, upon a *fieri facias*, that the defendant was *clericus beneficiatus non habeus laicum feodum*, there issued a *fieri facias* to the bishop, upon which he used to sequester [AS THEY CALL IT], the ecclesiastical possessions of the defendant; but that is not properly a sequestration; for the ordinary must not return *sequestrari feci*; he must return *fieri feci* or *nulla bona*, in like manner as a sheriff of a county must do: this I have known in experience, that a bishop has been ordered in such a case to amend return." (The words included in brackets are not quoted by the Serjeant.) After referring to the report of the same case in 2 Mod. 257, and 1 Freem. 231, the note proceeds thus: "*N. B.*—There seems to be an inconsistency in the opinion of Lord *North*, that a bishop is to sequester, and yet cannot return that he has done so, but must return either a *fieri feci*, or a *nulla bona*; for if he was to return a *fieri feci*, it seems that he might be ruled to bring the money into Court; and if he was to return *nulla bona* when the defendant had an ecclesiastical living, the plaintiff might have an action on the case for a false return; 1 *Sid.* 276. It therefore seems the ordinary might return a sequestration where the writ is to levy the debt, *de bonis ecclesiasticis*, as well as when, instead of such a writ, a writ of sequestration is granted to sequester." Now, it cannot be said that there is any real inconsistency in what Lord *North* advances; for he asserts, that the execution of the writ of *fieri facias de bonis ecclesiasticis* is "*not properly* a sequestration," although "they call it so," (that is, the ecclesiastical officers so designate it); and the reason he gives why it is not properly a sequestration, is, that the bishop cannot return *sequestrari feci*. Lord *North*, therefore, does not fall into the inconsistency of stating "that a bishop is to sequester, and yet cannot return that he has done so;" but what he says, in effect, is, the bishop being called upon to *levy*, does so, and *calls* it *sequestering*; but it is not so, for he cannot return that he has *sequestered*, but must return that he has done what he was called upon to do, namely, *levied*. The writ of *sequestrari facias*, which is mentioned in the addition to *Burns* text, appears to be a modern introduction, although the writ of *fieri* or *levari facias de bonis ecclesiasticis* is sometimes termed *a writ of sequestration* (see *Bac. Abr.*, "Execution," G. 6), arising probably from the fact that the execution issued by the bishop was, "as they call it," a sequestration.

To render this intelligible, it will not, perhaps, be out of place to refer to the nature of these peculiar proceedings in the case of the clergy. It is well known that the church formerly possessed great immunities, solemnly guaranteed by *Magna Charta*. Among others, was the privilege, that neither the clergy, nor church property, should ever be touched by lay hands; hence it followed that, in cases where the proceedings in an action commenced either by *capias*, or by *summons* of the defendant, which, in case of his non-appearance, was followed up by *attachment* or *distress* of his goods, if the sheriff returned that the defendant had been summoned, or that he could not be found, and that he was a beneficed clerk, having no goods or lay fee within his bailiwick, by which he might be attached, a writ, called *venire facias clericum*, issued to the ordinary, by virtue of which he *sequestered* (or attached), the issues of the defendant's benefice to compel his appearance; if the ordinary neglected to comply with the exigency of this writ, an *alias* and *plurias* issued (as in the case of writs directed to the sheriff), and if these proved ineffectual, a writ went out to the sheriff, commanding him to *distrain* or *attach* the bishop, so as to compel him to force the appearance of his clerk; (see 2 Inst. 4, b; *Finch*, B. 4, c. 3, p. 135, a. [389, ed. 1759];

Peacock, in support of the rule, insisted upon his former objections, and said it was like the case of a sheriff returning that he had levied a certain sum, without stating that the defendant had no more goods in his bailiwick.

TINDAL, C. J.—The return had better be amended, but there will be no costs.

Rule absolute.

Dalton's Sheriff, 100, 166; *Jac. Law Dic.* Tit. *Clergy*; and see the forms of these writs, which have long been obsolete; *Lib. Intr.*, 220, a.; *Reg. Judic.*, 3 a, 22 a.) In like manner, if, after judgment, the plaintiff issued a writ of *fieri*, or *levari facias*, directed to the sheriff, and he made a similar return as in the former case, a *fieri* or *levari facias de bonis ecclesiasticis* went out to the bishop, who thereupon issued "a sequestration" (as before, and which answers to the sheriff's *warrant* to his bailiff to execute the lay writ), under which he appointed certain *sequestrators*, generally the churchwardens, or parties nominated by the plaintiff (answering to the *special bailiffs* appointed by the sheriff at the plaintiff's naming), and they took the issues of the defendant's benefice into their hands, and after providing for the decent service of the benefice, paid the residue from time to time to the plaintiff; (see 2 Inst. 4; F. N. B., 266, a; *Lib. Intr.*, 220, b; *Reg. Judic.* 22, a; 26, b; 3 *Blac. Com.* 418.) These writs are still in use, in all cases where a beneficed clergyman having no lay fee is the defendant; see *Tidd's Prac.* 1059, 60, (6th ed.); App., 432, 3; where, also, a writ of *sequestrari facias* is mentioned, and a form thereof given, commanding the bishop in terms "to take and sequester" the defendant's rectory, &c., until the bishop shall have levied the plaintiff's debt and damages of the rents, tithes, &c., and other ecclesiastical goods of the defendant. See also the form of the *sequestration*, *id.* App. 435. As to the return of the writ of *fieri* or *levari facias de bonis ecclesiasticis*, see *Marsh* v. *Fawcett*, 2 H. Bl. 582; *Hart* v. *Vollans*, 1 D. P. C. 434.

CALLENDER *v.* OELRICHS and another.

Nov. 12

Where an agent undertakes to effect an insurance, if he fail in doing so, it is his duty to give notice to his principal.

Assumpsit will lie for the breach of such duty; and the promise laid in the declaration need not be proved.

SPECIAL Assumpsit. The declaration stated, that whereas, before the making the promise, &c., the plaintiffs had shipped a certain large quantity of wheat, to wit, &c., of the value, &c., on board a certain ship called the *Johanna*, then lying in the port of *London*, which was about to proceed from *L.* to *Baltimore*, in *America*. And thereupon, &c., to wit, on the 22d of *April*, 1837, in consideration that the plaintiff, at the request of the defendants, had then employed the defendants as his agents, for certain commission and reward, &c., to sell and dispose of the said wheat on the arrival thereof at *B.*, and to effect an insurance thereon upon certain terms, &c., whereby the same should be insured against the perils of the sea, &c., to the amount, &c.; and that, upon the effecting of such insurance, the defendants should stipulate with the assurers thereof by a policy or policies of assurance that the same should be subject to particular average above ten pounds *per cent.*, *the defendants* undertook and faithfully *promised* the plaintiff to use due and reasonable diligence, and faithfully to discharge, &c., their duty as agents as aforesaid, *and in the event of any difficulty arising in effecting such insurance*, or if they should be prevented effecting such insurance on the terms aforesaid, *to give notice thereof to the plaintiff, within a reasonable time.* *Averment*, that the plaintiff indorsed and delivered the bill of lading

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of the wheat to the defendants, and the defendants took possession thereof upon the terms and for the purpose aforesaid: and thereupon it became the duty of the defendants, as such agents as aforesaid, to cause the said wheat to be insured on the terms and conditions in that behalf, pursuant to the orders and directions of the plaintiff in the premises, *or if they did not cause the same to be so insured, then to give notice to the plaintiff*, within a reasonable time then next following, *that they had not done so.* Further *averment*, that the defendants did not nor would fulfil the directions of the plaintiff in this behalf, but, on the contrary thereof, wrongfully and improperly disobeyed the same by effecting an insurance upon the said wheat, free from average, &c., unless general, or the ship should be stranded; and further disregarding, &c., wholly *omitted to give the plaintiff such notice* as aforesaid, although a reasonable time in that behalf afterwards, and after the defendants had effected such last-mentioned insurance, and before the loss hereinafter mentioned, elapsed. Further *averment*, that after the said ship, &c., with the wheat on board thereof, had set sail from *L.*, and before her arrival at *B.*, to wit, on the high seas, by the violence of the winds, &c., and the sea-water which came into the said ship, and other perils of the seas, the said wheat was greatly destroyed, wasted, damaged and spoiled, whereby the plaintiff sustained an average damage or loss upon the said wheat to a larger amount than 10*l.* per cent., to wit, 90*l.* by the hundred for each and every 100*l.* value of the said wheat so insured by the said policy; and that, by means of the premises, the plaintiff was wholly prevented from effecting an insurance upon the said wheat upon the terms and conditions he had requested and directed the defendants to effect, and as he could, and otherwise would, &c., if the defendants had given such notice as aforesaid. *Special damage*, by being deprived of the means of recovering the amount of the average loss.

Pleas: first, the general issue; *second*, that difficulties having arisen in effecting the said insurance, *the defendants did give notice* thereof *to the plaintiffs* within a reasonable time.

At the trial, before *Coltman*, J., at the *London* Sittings after last *Hilary Term*, it appeared, in evidence, that the plaintiff, who was a corn-dealer, had consigned certain corn to the defendants' house, and *that they had undertaken to get it insured*, if possible; that they endeavoured to do so, but, owing to the corn being shipped in a vessel of the third class (B. 1), they were unable to succeed; it was also shewn that they had returned no answer to inquiries which the plaintiff had made by letter, as to whether the wheat had been insured; and that *they had given no notice of their not having effected an insurance:* there was no proof, however, of any *express* promise to give such notice.

The jury returned a verdict for the plaintiff.

Wilde, Serjt., in *Easter Term*, obtained a rule *nisi* for a new trial, on the ground that, there being no proof of any promise to give notice, the declaration was not supported by the evidence.

Sir *F. Pollock*, Q. C., and *R. V. Richards*, now shewed cause.—This is the ordinary case of an implied contract arising from the relation of the parties; the implied contract is, that the defendants would do their duty as agents; it was for the jury to say whether it was a part of such duty that, if

they could not effect the insurance, they were to give notice thereof to their employer, and they have found against the defendants.

Ogle, in support of the rule.—The defendants are not insurance brokers, whose duty it might possibly be to give notice to their principal in case of their not succeeding in effecting a particular insurance; they are merely agents of the plaintiff, who undertake to insure, and they perform their duty if they use reasonable diligence in that behalf; it is no part of their contract that they should give notice in case of their not being able to insure. If they have been guilty of any negligence, *case* would be the proper remedy; in which form of action the defendants might have placed themselves in the situation of the underwriters, and have availed themselves of any defence that was open to them in that character, *Harding* v. *Carter* (*a*), *Delaney* v. *Stodart* (*b*), *Webster* v. *De Tastet* (*c*). It would be a great hardship upon the defendants if the plaintiff, by varying his form of action, could deprive them of their defence. He referred also to *Corbett* v. *Packington* (*d*).

TINDAL, C. J.—I am of opinion that this rule must be discharged. The declaration is brought against the defendants, as agents to the plaintiff, and it states that, in consideration of his so employing them, they undertook and promised to insure certain wheat, and in case of any difficulty arising in their effecting such insurance to give notice to the plaintiff within a reasonable time; and it then goes on to allege, as a breach, that the defendants did not effect an insurance, nor give notice thereof to the plaintiff. The defendants now object that there was no evidence at the trial of any promise to give such notice; and the question, therefore, is, whether this part of the promise is the legal result of the defendants' duty. Now, it is an established rule of law, that *in actions against parties who have a duty cast upon them, the plaintiff has the option of stating the duty and the breaches committed by the defendant, in an action on the case; or of incorporating the duty in a contract, and proceeding accordingly by* assumpsit (*e*). Thus, the mere relation of landlord and tenant is sufficient to raise an implied promise on the part of the latter to manage the farm in a husbandlike manner, *Powley* v. *Walker* (*f*); though the plaintiff must take care not to allege a promise which the law will not imply as arising out of such relation, *Brown* v. *Crump* (*g*). This brings us, then, to the question whether the allegation in this declaration, that the defendants' promise to give notice to the plaintiff in case any difficulty arose in effecting an insurance, can be supported by a legal liability to be inferred from the relation of the parties; and I think that it can, and that the defendants' duty would not be sufficiently performed unless, in the event of their failing to procure the insurance, they were to give notice of such failure to the plaintiff. The plaintiff writes to the defendants to inquire whether they have effected the insurance, and receives no answer; *non constat* but that if they had given him notice of their failure, he might have effected an insurance elsewhere. This case falls within the principle of

(*a*) 1 Park Ins. 4.
(*b*) 1 T. R. 22.
(*c*) 7 T. R. 157.
(*d*) 6 B. & C. 268; 9 D. & R. 258.
(*e*) See 1 Chit. Pl. 123, 4th ed.
(*f*) 5 T. R. 373.
(*g*) 1 Marsh, 567; 6 Taunt. 300.

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Smith v. *Lascelles* (*g*), where *Ashurst*, J., says, "It is true, indeed, that one person cannot compel another to make an insurance for him against his consent; but if the directions to insure be given to him, to whom the application would naturally be made in the usual course of trade, *and he does not give notice of his dissent*, he must be answerable for his neglect, because he deprives the other of any opportunity of applying elsewhere to procure the insurance." It seems precisely the same as if in an action of *assumpsit* by a landlord against a tenant, the promise were laid to cultivate the farm, and properly to manure the land, and not to pull down the hedges; in which case it would certainly not be necessary to prove a specific promise not to pull down the hedges. The jury here have found that the promise was made by the defendants, and their verdict is consistent with law.

VAUGHAN, J.—I am of the same opinion, and am not disposed to disturb this verdict, which I think is consistent both with law and justice. A plaintiff can recover only *secundum allegata et probata:* now the plaintiff here in substance alleges that the defendants promised either to effect an insurance or give notice of the failure; it appears to me it was their duty to give such notice; and although there was no express promise to do so, it is a necessary inference of law, from the situation of the parties: the defendants undertake to effect an insurance; the plaintiff writes to inquire whether it is done, and receives no answer, and is thereby lulled into security. *Corbett* v. *Packington* does not apply; for in that case an implied promise was raised to redeliver goods, which was *ultra* the defendant's common law duty.

BOSANQUET, J.—The jury have found that it was the defendants' duty, first, to effect an insurance, and secondly, to give notice if they failed in doing so. The first finding was fully warranted by the evidence; and as to the second, I am of opinion that the jury were also warranted in finding that the defendants *ought* to have given the notice, and the law will consequently imply a promise on their part to do so. I think that this inference fairly arises out of the circumstances of the case and the relation of the parties, and that this case falls exactly within the principle of *Smith* v. *Lascelles*.

COLTMAN, J.—It appeared to me at the trial, and I see no reason now to vary from my opinion, that a duty was cast on the defendants, if they should be unable to effect an insurance, to give notice to that effect to the plaintiff; and if such a duty was cast upon them by the circumstances of the case, the pleader was authorized in treating it as an implied contract.

Rule discharged.

(*h*) 2 T. R. 187.

CATTEL *v.* GAMBLE.

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Nov. 5.

The plaintiff in *April*, sold by auction the herbage of certain closes in lots, subject to printed conditions of sale, by which the highest bidder was to be entitled to *possession* till the following *September*; he was to pay down a deposit, and give security for the residue, and on failure of his so doing, the deposit was to be forfeited. The defendant became the purchaser of lot 2 for 45*l.*, and signed the *conditions of sale*:—*Semble*, that this document constituted a lease; and *held*, that if so, it was a "lease granted in consideration of a premium," within the meaning of the Stamp Act (Schedule, Tit. *Lease*), and therefore, the sum paid being under 50*l.*, that a 1*l.* stamp was sufficient.

ASSUMPSIT for the use and occupation of pasture land, and the eatage of grass. *Pleas, non-assumpsit* to all but 30*l.* 15*s.*, and payment into Court of that sum.

At the trial, before the under-sheriff of *Warwickshire*, it appeared that the herbage of certain lands belonging to the plaintiff, had been put up to auction in lots in *April*, 1835, when the defendant purchased lot 2, for 45*l.*, under the following "Particulars and conditions of sale:"

"PARTICULARS.

"Lot 2. The herbage of *Upper Townsends Close, Lower Townsends Close*, and the Pringle, containing 16*a.* 2*r.*"

"CONDITIONS OF SALE.

"1st. The highest bidder for each lot shall be the party entitled to *possession* for the time stipulated under the following conditions, free from the parish rates and tithes.

"3d. The highest bidder for each lot shall *pay down* immediately on such highest bidding being declared, into the hands of the auctioneer, *a deposit* of 10*l. per cent.* on the amount of his bidding, *and give* a satisfactory *joint note for the residue* thereof, payable, &c.

"4th. The *lessees* shall be entitled to *possession* of their respective lots until the 29th day of *September* next.

"5th. Each party becoming *lessee* as aforesaid shall, on the 29th day of *September* next, peaceably and quietly *yield up the possession* of the respective lots to the owner of the same respectively, and in case of any delay in so doing, the party or parties making default shall be deemed a wilful trespasser or trespassers, and forcible possession shall and may be taken of each and every lot so withheld; and the cattle and the stock thereon shall and may be impounded accordingly, without any liability or responsibility being thereby incurred in any shape whatever.

"7th. If any *purchaser* shall fail to give such satisfactory joint note as aforesaid, his deposit money shall be absolutely forfeited, and the *vendors*, in that case or any other case of default, shall be at liberty to *re-let* the premises, either by auction or private contract, as they may think right, and the deficiency (if any), thereby occasioned, and all expences thereupon attendant, shall be made good by the defaulter, and be recoverable by the *vendors* as and for liquidated damages."

The following memorandum was written at the foot:

"I have purchased, under the above conditions, lot 2, at 45*l.*

(Signed) "*T. Gamble*" (the defendant).

This document, stamped with a 1*l.* agreement stamp, was offered in evidence by the plaintiff, and objected to by the defendant, on the ground that

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it ought to have been stamped as a lease. It was received in evidence, the point being reserved to the defendant. The plaintiff had a verdict for 14*l.* 5*s.*

Channell now moved to enter a nonsuit. The contract in substance was that the party purchasing was entitled to the occupation of the premises till the 29th of *September* following, and therefore it amounted to a lease; *Bac. Abr. Leases* (K), where it is said, "It may be laid down for a rule, that, whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the possession and the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose." And again: "so, if one only license another to enjoy such a house or land till such a time, this amounts to a present and certain lease or interest for that time, and may be pleaded as such, though it may be also pleaded as a licence; and if it be pleaded as a lease for years and traversed, the lessee may give the licence in evidence to prove it (*a*)." Taking this document, then, as a lease, the next question is, what stamp it would require. By the schedule to the general Stamp Act (*b*), four classes of leases were contemplated; first, leases granted upon a premium, without any, or only a low rent; secondly, leases reserving rent, without any premium; thirdly, leases granted upon a premium, and reserving rent also; and fourthly, all other leases not coming within either of the other three denominations. Now, this contract was certainly not within either the second or third class. It might, indeed, be contended that it was within the first, and that the 45*l.* to be paid by the defendant was "a sum paid by way of premium" in the language of the Act; but, looking at the nature of the contract, this sum cannot be so considered, as the money was not to be paid in the first instance.—[*Vaughan*, J.—Is it the less a premium because it is to be paid by instalments?]—There are three acts to be done by the purchaser: first, to pay a certain sum by way of deposit; secondly, to find security for the residue; and thirdly, to pay the residue.—[*Vaughan*, J.—What is a *premium* more than a money consideration for a thing to be done?]—A premium is in the nature of a payment that precedes every thing to be done by the parties (*c*). Here if, after the purchaser had paid the deposit, he were to fail to find the security, or pay the residue, he might be turned out of possession. This, therefore, is in the nature of a conditional

(*a*) Citing 5 H. 7; 1 Leon. 129; 3 Bulstr. 252; Sid. 428; 1 Mod. 14; 2 Keb. 561; 2 Lev. 194; 3 Keb. 761; Hard. 366.

(*b*) 55 Geo. 3, c. 184, "*Lease* granted *in consideration of a* sum by way of *fine, premium*, &c., paid for the same, without any yearly rent, or with any yearly rent under 20*l.*, the same duty as for the conveyance on the sale of lands for a sum of money of the same amount:" (An *ad valorem* duty: where the purchase-money shall amount to 20*l.*, and not to 50*l.*, duty, 1*l.*, Tit. *Conveyance.*) "*Lease* of any lands, &c., at a yearly rent without any fine, premium, &c." (an *ad valorem* duty; above 20*l.*, and under 100*l.*, duty, 1*l.* 10*s.*) "*Lease* granted in consideration of a fine, premium, &c., and also of a yearly rent amounting to 20*l.*; both the *ad valorem* duties payable for a lease in consideration of a fine only, and for a lease in consideration of a rent only of the same amount. *Lease* of any kind not otherwise charged, duty, 1*l.* 15*s.*"

(*c*) See *Boone* v. *Mitchell*, 1 B. & C. 18.

lease, and as such, would fall within the fourth class, as not being otherwise charged in the schedule; and in that case the stamp is not sufficient.

TINDAL, C. J.—Assuming that the document in question ranges within the description of a lease cited from *Bacon's Abridgment*, the question then is, how does it range within the provisions of the Stamp Act? The first head in the schedule that relates to leases, speaks of a "lease granted in consideration of a sum by way of fine, or premium paid for the same, without any yearly rent;" if there were no other clause, should we have any difficulty in deciding this question? Then it is admitted that this document does not fall within the two next clauses; but it is contended that it comes within the last, "as a lease not otherwise charged:" but I am of opinion that it does range within the first class; and then, looking back to the title Conveyance, to which the schedule refers as to this class of leases, we find that the stamp affixed, regard being had to the amount of the purchase-money, is sufficient.

The other judges concurred.

Rule refused.

READ *v.* CROFT.

Nov. 14.

ASSUMPSIT against the acceptor of a bill of exchange. *Plea*, that, after the bill became due, the defendant had petitioned the Insolvent Court, and had been duly discharged. *Replication*, that the plaintiff had no notice of the petition, and that he was resident within the *United Kingdom*, and might have had such notice. *Demurrer*.

To a plea of discharge under the Insolvent Act, a replication that the plaintiff had no notice of the defendant's filing a petition, &c., *held* ill.

James, for the demurrer, contended it was not incumbent on a prisoner to give any notice under the Insolvent Act (*a*); the 40th section requires a prisoner, within fourteen days after filing his petition, to deliver in a schedule of debts, property, &c., and by the 42d section (*b*), the duty of giving notice was imposed upon the Court; and it cannot be inferred that they have not done their duty.

Humfrey, *contrà*.—The Act releases a debtor only from those debts of

(*a*) 7 Geo. 4, c. 57. This Act would have expired on the 1st of *June*, 1829, but was continued from time to time. It is now superseded by 1 & 2 Vict. c. 110.

(*b*) Enacting, that "The Court shall cause *notice* of the filing of every petition and schedule, and of the time and place appointed for hearing the matters of such petition and schedule, to be given, by such means as the Court shall direct, to the creditor at whose suit any such prisoner shall be detained, and to the other creditors named in the schedule of such prisoner, and resident within the United Kingdom, and whose debts shall amount to the sum of 5*l.*, and to be inserted in the *London Gazette*, and also in such other newspapers as the said Court shall direct."

By the *General Order* promulgated by the Insolvent Court, 13th *June*, 1826, § 14, the manner of giving notice to creditors is pointed out, and § 15 describes the manner in which proof of notice shall be given. See *Warrand's* Insolv. Act, pp. 89, 91.

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which notice has been given; by section 60 (*c*), if a party who has been discharged under the Act is arrested a second time, he may go before a judge and obtain his discharge, but, in order to do so, he must shew that notice was duly given. The defendant says he was "duly discharged;" and if the plaintiff had merely taken issue on that plea, he would only have put in issue the fact of the adjudication, *Andrews* v. *Pledger* (*d*). The plaintiff wishes to raise the issue that there has been a false description of his debt in the defendant's schedule; and the replication would raise that question.

TINDAL, C. J.—It appears to me that the 42d section is only directory to the Insolvent Court, and that it does not make the giving notice a condition precedent to the prisoner's discharge. The replication here does not even allege that the plaintiff did not know of the defendant's petition. He might easily have replied that the debt was not duly inserted in the schedule; and if that is the issue which he wishes to raise, we will give him leave now to amend his replication accordingly, on payment of costs.

Leave to amend.

(*c*) Enacting, that "no person who shall have become entitled to the benefit of this Act by any such adjudication, shall be imprisoned for any debt with respect to which such person shall have become so entitled, but upon every arrest for any such debt, it shall be lawful for any judge of the Court from which any process shall have issued in respect thereof, upon proof made to his satisfaction that the cause of such arrest is such as hereinbefore mentioned, to release such prisoner from custody, *unless* it shall appear to such judge, upon inquiry, that *such adjudication was made without due notice*, where notice is by this Act required, being given to or acknowledged by the plaintiff, or by him dispensed with."

(*d*) 4 C. & P. 274; Moo. & Malk. 508.

Nov. 15.

JACKSON and another *v.* GALLOWAY.

Assumpsit. The declaration stated that, by a *charter-party* made on the 2d *Dec.*, it was agreed, between the plaintiffs and defendant, that a ship, belonging to the former, then at *P.*, should, with all convenient speed, sail to *C.*, and there take in a cargo of coals and iron, and proceed therewith to *A.*, "forty running days to be allowed for loading the ship at *C.* and unloading at *A.*, *to commence on the* 16*th Dec.*, and ten days on demurrage, over and above the said laying days, at 7*l.* per day;" that afterwards, on the 2d *Dec.*, the ship then being at *P.*, *by and with the consent of the plaintiffs and defendant, and at the request of the defendant*, the ship remained at *P.* till the 17th *Dec.*, for the purpose of taking in the cargo of coals, instead of being loaded therewith at *C.*; that the ship arrived at *C.* on the 18th *Jan.*, and there remained taking in her cargo of iron till the 2d *Feb.*, when she set sail for *A. Breach*, that defendant kept the ship at *C.* twenty days over and above the lay-days and days of demurrage mentioned in the charter-party, and would not pay demurrage in respect thereof. The jury found that the ship remained at *P.* for the purpose of taking in the coals, *at the request of the plaintiffs, and with the consent of the defendant*, and gave the plaintiffs a verdict for the *extra* twenty days the ship was detained at *C.*:—*Held, first*, that this finding supported the issue; *secondly*, that the substitution of *P.* for *C.*, as the place where the coals were to be shipped, was a new agreement, varying the original contract as to the *place* of loading, but that the contract remained unaltered as to the *number of lay and running days*, and therefore, that the jury were right in allowing for the twenty *extra* days.

ASSUMPSIT. The declaration stated, that on the 2d of *December*, 1834, by a charter-party made between certain persons trading under the firm of *G. L. Jackson & Sons*, on behalf of the owners of the ship called

The City of Rochester, then at Pembroke, and the defendant, charterer of the said ship, it was mutually agreed that the ship should, with all convenient speed, sail, and proceed to *Cardiff*, or so near, &c., and there load from the factors of the merchant, about 400 tons of iron, which the merchant bound himself to ship, together with 150 tons of coals, but not exceeding what she could reasonably stow and carry, over and above the tackle, &c., and being so loaded, should therewith proceed to *Alexandria*, or so near, &c., and deliver the same on payment of freight, &c., forty running days to be allowed the said merchant (if the ship was not sooner despatched), for loading the ship at *C.*, and for unloading at *A.*, to commence on the 16th then instant, cease when loaded and dispatched, recommence on arrival at *A.*, and finally cease when unloaded; and ten days on demurrage over and above the said laying days, at 7*l. per* day. And the said charter-party being so made as aforesaid, afterwards, to wit, on the day and year first aforesaid, in consideration thereof, &c., (promise by defendant to perform). *Averment*, that after the making of the promise of the defendant, to wit, on the 2d of *December*, 1834, the ship then being at *P.*, *by and with the consent of the plaintiffs and the defendant, and at the request of the defendant*, remained at *P.* for the purpose of receiving on board a certain quantity of coals, part of her cargo for the intended voyage, in lieu and instead of the ship being loaded with such coal as aforesaid at *C.*, as in the charter-party mentioned. That the ship did, with the consent and at the request of the defendant as aforesaid, receive on board at *P.* divers large quantities of coal as aforesaid; and in so doing, and without any default or neglect on the part of the plaintiffs in that behalf, was, for the purpose aforesaid, kept and detained by the defendant at *P.*, from the day and year last aforesaid, until the 17th of *December*, in the year last aforesaid. That the defendant did dispense with and discharge the plaintiffs from performing that part of the charter-party which relates to the sailing of the ship with all convenient speed, as in the charter-party mentioned, from *P.* to *C.*, up to and until the time the ship had finished and completed the loading of the coals on board thereof at *P.*, and being so loaded, that afterwards, to wit, &c., the ship did, with all convenient speed, proceed and sail to *C.*, and afterwards, to wit, on the 18th of *January*, 1835, arrived at *C.*, and was then ready to receive, and did receive on board the residue of the cargo in the charter-party mentioned, from the factors of the defendant, and afterwards, to wit, on the 2d of *February*, 1835, the loading of the ship being then completed and finished, and the ship being ready to proceed on the said voyage, of which the defendant then had notice; the defendant, not regarding his promise, kept and detained the ship at *C.* for the space of twenty days over and above the lay days and the ten days of demurrage in the charter-party mentioned, whereby the plaintiffs were put to great cost, &c., to wit, &c., in and about the maintaining the master and mariners of the ship for the said period, and lost and were deprived of the use of the ship and all profit thereof for the period aforesaid, and whereby a large sum, to wit, &c., became due and payable to the plaintiffs for the said demurrage at *C.*, for the days of demurrage in the charter-party mentioned. That the ship afterwards, to wit, on the 19th of *February*, in the year last aforesaid, being fully laden and despatched by the defendant, proceeded, with the cargo on board, to *A.*, and afterwards, to wit, on the 10th of *July*, in the year last aforesaid, arrived there, and afterwards, to wit, on the 13th of *July*, in the year last aforesaid, was

ready to unload the cargo, of which the defendant then had notice. That the defendant, further disregarding his promise, kept and detained the ship after she was so ready to unload as last aforesaid, and after such notice as last aforesaid, a further space of time, to wit, thirty days over and above the lay days and the ten days of demurrage in the charter-party mentioned, whereby the plaintiffs were put to a further great cost, &c. That the defendant, further disregarding his promise, did not nor would pay the plaintiffs the said sum, &c., so due and payable for the demurrage of the ship at *C.*, but hath hitherto wholly neglected, &c.

There were also counts for general average for freight; for the hire of vessels; for money paid, and for money due on an account stated.

Pleas: first, to the whole declaration, *non-assumpsit*.

Second (*a*), as far as relate to the claim for demurrage, that *the defendant did not consent and request* that the ship should remain at *P.*

Third, that the ship was not detained or kept by the defendant at *P.*, for the purpose mentioned.

Fourth, that the defendant did not dispense with or discharge the plaintiffs from performing that part of the charter-party which relates to the sailing of the ship with all convenient speed from *P.* to *C.*, up to and until the time the ship had finished and completed the loading of the coals on board at *P.*

Fifth, that the ship, being so loaded with coals, did not, with all convenient speed, sail and proceed to *C.*

Sixth, that the ship was not at *C.* on the 10th of *January*, 1835, ready to receive on board the residue of the cargo from the factors of the defendant.

Seventh, that the defendant did not detain or keep the ship at *C.* any part of the time over and above the lay days and the ten days of demurrage.

Eighth, as to the keeping and detention of the ship at *A.*, that the defendant did not keep or detain the ship after she was ready to unload the cargo, and after notice over and above the lay days and days of demurrage.

Upon these pleas issues were joined.

Ninth, as to the demurrage, so far as the same relates to the running days to be allowed for loading the ship at *C.*, and for unloading at *A.*, that before the arrival of the ship at *C.*, disputes arose between the plaintiffs and defendant as to the time from which the running days were to commence, and the defendant, on several occasions, before the arrival of the ship at *C.*, expressed to the plaintiffs his doubts as to the propriety of a particular day being specified in the charter-party as to the period from whence the running-days were to commence, and thereupon afterwards, and before the arrival of the ship at *C.*, to wit, on the 14th of *December*, 1834, it was mutually agreed, by and between the plaintiffs and defendant, that, in order that the defendant's objections might be removed, the terms of the charter-party, as to the time when the running days were to commence, should be altered by inserting in the charter-party, after the words, "or three days after the 16th instant," the following words: "or three days after the ship's arrival at *Cardiff*." And the plaintiffs then, in pursuance of the agreement, did alter the terms of the charter-party as to the time when the running days

(*a*) This and the subsequent pleas were pleaded to the first count only.

were to commence, by inserting in the part of the charter-party signed by *G. L. Jackson & Sons*, on behalf of the plaintiff, after the words "to commence, &c.," the following words: "or three days, &c." And the plaintiffs then accepted the charter-party so altered, in substitution and satisfaction of and for the charter-party in the first count mentioned; that the ship did not arrive at *C.* until the 9th of *January*, 1835, and that the defendant did load the ship at *C.*, and afterwards unload at *A.*, and that he did not detain the ship beyond the space of forty running days, calculated upon the terms last aforesaid.

Replication, de injuriâ.

(There were other pleadings, not material to the question before the Court.)

At the trial before *Tindal*, C. J., at the *London* Sittings after last *Hilary Term*, it appeared that, on the 2d of *December*, 1834 (the day on which the charter-party was made), the vessel was at *Pembroke*; at that time she had not quite unloaded a cargo of timber; she remained there until the 16th of *December* (the day mentioned in the charter-party for the commencement of the loading at *Cardiff*), and from thence till the 26th, taking in her cargo of coals; on the 10th of *January*, she arrived at *Cardiff*, where she remained till the 19th of *February*, taking in her cargo of iron. It further appeared that, while the cargo was being loaded at *Pembroke*, a discussion arose between the parties as to the necessity of altering the time mentioned for the commencement of the running days, and the place where the coals were to be loaded. The Chief Justice left it to the jury to say whether the defendant consented to the ship's remaining at *P.* to be loaded with coals, instead of being so loaded at *C.* The jury returned a verdict for the plaintiff on all the issues, damages, 170*l.*; and expressly found that it was *at the plaintiff's request, and by the defendant's consent*, that the ship remained at *P.* to be loaded with coals.

Talfourd, Serjt., in *Easter Term*, obtained a rule *nisi* for reduction of the damages, or for a new trial, on the ground that the Chief Justice ought to have left it to the jury to say whether there was any agreement that the defendant was to be charged for the time at *Cardiff*, and also whether, in the terms of the issue, the ship was to remain at *Pembroke*, with *the consent of the defendant, and at his request*; and that the finding of the jury upon this point did not support the issue.

Wilde, Serjt., on a former day in this term, shewed cause: he contended that the question was properly left to the jury, and that their finding substantially supported the issue; the real question being, whether there had been a variation from the terms of the charter-party as to the place where the coals were to be loaded, by the consent of both parties; and the jury found in the affirmative. The charter-party was therefore to be read as if *Pembroke* had been substituted for *Cardiff* as the port of loading, but the lay-days would still be calculated from the 16th of *December*, at whichever place the ship took in her cargo. The defendant having taken the ship into his service, by loading part of the cargo at *Pembroke*, is precluded from denying the plaintiff's right to recover in respect of the time she was detained there; *Havelock* v. *Geddes* (*a*).

(*a*) 10 Ea. 555.

became bankrupt, and within two calendar months before the issuing of the *fiat* against him, the said *A. G. R.*, under which the plaintiffs are assignees. *Verification.*

Rejoinder, that *A. G. R.* did not, nor did the plaintiffs at any time tender or offer to pay to the defendant the advances of money in the plea mentioned or any part thereof, and the same remain and are wholly unsatisfied and unpaid to the defendant. *Verification.*

Demurrer and *joinder.*

Tomlinson, in support of the demurrer.—The question is, whether a pledge of goods by a trader, as a security for an advance of money, made within two months before the issuing of a *fiat*, is protected, so as to give the pawnee a title against the assignees. The general title of the assignees relates back to the act of bankruptcy, and all transactions after the bankruptcy are void against them, unless they are either affirmed by them (which is not the case here, as they have brought trover (*a*), or unless they are within the protection of the 81st or 82d section of the Bankrupt Act (*b*), *Hill* v. *Farnell* (*c*). As the present transaction took place within two months before the issuing of the *fiat*, it is not protected by the 81st section; and the 82d applies only to *payments*, but this is a case of *loan upon security*; and *Cannan* v. *Denew* (*d*) has expressly decided that such a case is not within that section. The cases in which it has been decided that *sales* were protected by the 82d section, such as *Hill* v. *Farnell*, *Cash* v. *Young* (*e*), have proceeded upon the ground that the *payment* which accompanied the *sale* would not be "protected," within the meaning of the Act, unless the *sale* were validated; but that principle cannot apply here, where there is no *payment* at all.

Hoggins, contrà.—The object of the legislature was to protect all *bonâ fide* money transactions, although occurring within two months before the issuing of a *fiat*. The 47th section entitles *bonâ fide* creditors to prove, and the 50th section enables mutual debts and credits to be set off against one another; in both cases, notwithstanding a secret act of bankruptcy may have been committed; now, this is a credit given by each party. In *Willis* v.

(*a*) See *Smith* v. *Hodgson*, 4 T. R. 211.

(*b*) 6 G. 4, c. 16, s. 81, enacts, "that all conveyances by, and *all contracts and other dealings and transactions* by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the issuing of the commission, shall be valid, notwithstanding any prior act of bankruptcy: provided the person so dealing with such bankrupt had not, at the time of such conveyance, contract, dealing or transaction, notice of any prior act of bankruptcy;" sec. 82 enacts, "that *all payments* really and *bonâ fide* made *by any bankrupt* before the issuing of the commission, *to any creditor* of such bankrupt (such payment not being a fraudulent preference), shall be deemed valid, notwithstanding any prior act of bankruptcy, and all payments really and *bonâ fide* made *to any bankrupt* before the issuing of the commission, shall be valid notwithstanding any prior act of bankruptcy, and *such creditor* shall not be liable to refund the same to the assignees, provided *the person so dealing* with the bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy."

(*c*) 9 B. & C. 45.

(*d*) 10 Bing. 293; 3 Mo. & S. 761.

(*e*) 2 B. & C. 413; 3 D. & R. 652.

The Bank of England (*f*), it was held, and indeed the contrary was not contended for, that the assignees could not recover from the Bank the amount of a bank post bill changed by a banker, a *bonâ fide* holder for value, after the act of bankruptcy, but without notice, and by him paid into the Bank. That was the mere case of the exchange of a bill for money, and the banker may be said to have bought the money with the bill.—[*Tindal*, C. J.—That would be rather a strong metaphor.]—It is a money transaction, and ends in one, as does the transaction in this case. The brokers in the City are in the habit of depositing bills upon advances to a large amount, and it would be of the most serious consequences to commerce if it should be held that, owing to a previous secret act of bankruptcy, such transactions were invalid. If a man lends money, he may, in one sense, be said to pay it over.—[*Tindal*, C. J.—Unless terms are to lose their ordinary signification, a *loan* cannot be called a *payment*.]—This is the case of the advance of money upon a deposit of goods; in *Willis* v. *The Bank of England*, it was an advance of money upon the deposit of a bill, for as in that case the bankrupt had endorsed the bill after an act of bankruptcy, it could only amount to a deposit in law.—[*Bosanquet*, J.—The same argument would hold in the case of a sale of goods after an act of bankruptcy, for the bankrupt has lost his property in them if a *fiat* afterwards issues upon such act of bankruptcy.]—The bankrupt Acts are of a highly remedial nature, and the Courts have always given them a liberal construction; *Ashley* v. *Kell* (*g*). In *Cannan* v. *Denew*, it was not found that the money was advanced *bonâ fide*, which is admitted upon this record. In *Woodbridge* v. *Swann* (*h*), *A.*, after the bankruptcy of his partner, *B.*, believing the *firm* to be solvent, paid in partnership money to *C.*, their banker, to meet their current engagements, and the *money* was so applied: *A.* afterwards became bankrupt: it was held that the payment was valid, and that *C.* was not liable for the amount to the assignees of *B.* and *A.* So in *Shaw* v. *Batley* (*i*), *A.*, after a secret act of bankruptcy, bought goods of *B.*, to be paid for at a future day; on that day *A.* delivered to *C.* undue bills for the amount, requesting *C.* to pay *B.* for the goods. *C.* discounted the bills, and paid *B.* by a cheque on his bankers, and it was held that this payment was protected under the 82d section.—[*Bosanquet*, J.—That was a case of *payment*, and therefore, came within the very words of the Act.]—But the contract as well as the payment were after the bankruptcy. In this case, the bankrupt has the defendant's money, and he has a right to insist upon his lien, which is all he claims; *Dixon* v. *Purse* (*j*). In *Ex parte Prescot* (*k*), a debtor to the bankrupt upon a bond not then due, was allowed to set-off a simple contract debt due from the bankrupt under the 5th *G.* 2, c. 30, as being a case of *mutual credit*; the defendant here is just as much entitled to his set-off.—[*Tindal*, C. J.—This is an action of *trover*, in which there can be no set-off.]—In *Olive* v. *Smith* (*l*), it was decided, that if a person trusted his creditor with that which might become productive of value, the creditor might retain his debt out of the proceeds of the thing intrusted to him, and only pay the balance The case was, that *A.*, a merchant, employed *B.*, a broker, to effect

(*f*) 1 Har. & Wol. 620; 4 A. & E. 21; 5 N. & M. 478.
(*g*) 2 Stra. 1207.
(*h*) 4 B. & Ad. 633; 1 N. & M. 724.
(*i*) 4 B. & Ad. 801; 1 N. & M. 751.
(*j*) Peake Add. Ca. 187.
(*k*) 1 Atk. 230.
(*l*) 5 Taunt. 56.

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policies and sell goods, and trusted him with the possession of the policies: *A.*, being indebted to *B.* for premiums of insurance, and having obtained an advance of money upon a pledge of goods, placed in *B.'s* hands for sale, but not on those goods to the exclusion of *A.'s* general credit, became bankrupt: afterwards a loss happened, and *B.* received it from the underwriters; and it was *held*, that this was a *mutual credit* within 30 *G.* 2, c. 5, and that *B.* might retain the sum received for the loss, in liquidation of his advances, as well as of the balance due for premiums.—[*Bosanquet*, J.—There the transaction was before the bankruptcy.]—The observations of Lord *Hardwicke*, C., in *Ex parte Deeze* (*m*), cited by *Gibbs*, J., in *Olive* v. *Smith*, are very strong in favour of the defendant. Lord *Hardwicke* says, "it is hard where a man has a debt due from a bankrupt, and has, at the same time, goods of a bankrupt in his hands, which cannot be got from him without the assistance of law or equity, that the assignees should take them from him without satisfying the old debt; and therefore the clause in the Act of 5 *G.* 2, relating to mutual credit, has received a very liberal construction; and there have been many cases which that clause has been extended to, where an action of account would not lie, nor could this Court, upon a bill, decree an account." These observations fully apply to the present case, in which the defendant claims his right of set-off. [*Tindal*, C. J.—*Non constat* the defendant can ever sell the goods deposited with him, how, then, can a set-off arise? or if it should, the course would be for the commissioners to take an account between the parties under the 50th section of the Bankrupt Act.]—This is not a mere loan; it is an advance of money upon a security which the defendant has a right to retain in his hands till the advance is repaid.

TINDAL, C. J.—It appears to me, that the transaction stated on the face of this record does not amount to a *payment*, within the 82d section of the Bankrupt Act, and therefore it is not protected. That section professes to protect "all *payments* really and *bonâ fide* made by or to any bankrupt." Now, the word *payment*, *primâ facie*, denotes the liquidation of an antecedent debt, or of one contracted at the same time, but that definition would not include the present transaction; nor does it rest merely on the natural force of the word *payment*, for, looking at the 81st and 82d sections together, it is clear that the former is much more extended in its operation, for it includes "all conveyances and all contracts, and other dealings and transactions;" but the 82d is, in my opinion, limited to cases of *payment* between debtor and creditor, and how can we conclude that the term is used otherwise than with regard to that relation, when it is said, in the second part of the section, that "all payments really and *bonâ fide* made to any bankrupt, shall be deemed valid, and such *creditor* shall not be liable to refund the same (*n*)." The present

(*m*) 1 Atk. 228.

(*n*) It is observable that the first clause of the 82d section speaks of "*payments* made *by* any bankrupt *to any creditor*," and the second clause of "*payments* made *to* any bankrupt" (without adding the relative words *by any debtor.*) Now, if the word *payment*, *ex vi termini*, is limited to the payment of a *debt*, the addition of the words "to any creditor," in the first clause, would appear to be unnecessary; if, on the other hand, such is not the necessary meaning of the word, but if it is capable of a more extended meaning, the legislature would appear to have so adopted it in the second clause; and that *some* distinction was intended is

case, therefore, not being a *payment* in respect of a debt, I come to the conclusion that it is not protected by the 82d section. The defendant, as a creditor, may prove his debt, and stand *pari passu* with the other creditors. This is a *transaction or dealing* with the bankrupt, as it appears to me, which would fall expressly within the protection of the 81st section, if it were not that the period of two months, to which that protection is confined, has elapsed, and being so expressly within the 81st section, it would be a strange conclusion to hold it to be also within the 82d. Suppose a case in which there was a regular conveyance of property instead of a mere deposit; that would be clearly within the 81st section, and surely the creditor is not to be in a better condition because there has been no such regular conveyance.

VAUGHAN, J., concurred.

BOSANQUET, J.—The question is, whether the defendant is entitled to retain these goods against the assignees; and that will depend upon whether the transaction, whatever it may be called, between the defendant and the bankrupt, is within the protection of the 82d section, as it is clearly not within the 81st. Now this is a case of a loan of money upon a security, and *Cannan* v. *Denew* has already decided that such a case is not within the 82d section, nor, as it appears to me, can there be any set-off here under the 50th section, as the property remains *in specie* in the defendant's hands.

COLTMAN, J.—I think this case is perfectly free from doubt, even if *Cannan* v. *Denew* had not previously decided it. It cannot be put clearer than it has been by Mr. *Tomlinson*. It is a *loan*, and not a *payment*, and the 82d section applies to *payments* only; the 81st section is out of the case, except as furnishing a strong argument to shew that the 82d is of a more limited nature.

Judgment for the plaintiffs.

not wholly improbable, seeing that the section proceeds to say that "such *creditor* (*i. e.*, the creditor to whom a *payment* has been made *by a bankrupt*), shall not be liable to refund the same," and then continues, "provided the *person* so *dealing* with the bankrupt had not, at the time of such *payment* by or to such bankrupt, notice of any act of bankruptcy;" so that it would appear that a *payment* may include a *dealing* other than a strict payment of a *debt*."

WOOD *v.* BRENTON.

Nov. 2*b*.

ASSUMPSIT for goods sold. At the trial, before the secondary for *London*, it appeared that the plaintiff was a wine-merchant, and that the action was brought for 9*l.* 10*s.*, being the balance of an account for wine sold, the sum in dispute being the price of the bottles. The plaintiff's traveller

Wine was sold in bottles to the defendant. The bottles were charged in the invoice, but the defendant said he would arrange to return them to the plaintiff; they were not, however, returned. The plaintiff having recovered for the amount of the bottles, the Court refused to disturb the verdict.

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was called as a witness, and he stated that the wine was sold at different periods, and that invoices were delivered on each occasion, including charges for the bottles and hampers, as well as the wine; (the invoices were not produced.) The witness had received money on account of the invoices, and he admitted that the defendant had said he would arrange for the bottles to be returned, and that the plaintiff might have them if he sent for them. The bottles, however, had not been returned. The Secondary told the jury that, though the plaintiff had not distinctly shewn what the contract was, they had a right to import into the case their knowledge of the custom of wine merchants. The plaintiff had a verdict for the sum claimed.

R. V. Lee, on a former day in this Term, obtained a rule *nisi* for a nonsuit or a new trial, on the ground of misdirection.

Wilde, Serjt., now shewed cause, and *R. V. Lee* supported the rule.

TINDAL, C. J.—Although the Secondary may have used an unguarded expression, his real meaning is clear; and I think there was quite evidence enough to go to the jury, from which they might infer a contract to pay for the bottles.

The other judges concurring,

Rule discharged.

Nov. 16.

FERGUSSON, assignee of SMITH, a bankrupt, *v.* NORMAN.

A lien cannot arise out of an illegal contract. Where a Statute enjoins certain things to be done as preliminaries or accompaniments of a certain contract, and they are not complied with; such a contract is illegal and void, although a penalty may be imposed by the Act for the non-compliance with its injunctions.

By the 6th section of Stat. 39 & 40 G. 3, c. 99, every pawnbroker advancing money upon goods pawned, shall, "before he advance any money upon such pawn," make entries in his books of certain facts "into which he is required to enquire before any money shall be lent;" by the 26th section, a penalty is imposed for every neglect to make such entries:—*Held*, that such enquiries and entries are a condition precedent to the validity of a contract upon a pledge of goods with a pawnbroker, and therefore, that in the case of non-compliance with the requisitions of this Act, a pawnbroker could not set up a lien upon goods pawned with him.

TROVER for goods which had been pawned with the defendant, a pawnbroker.

The case was referred, and had been before the Court on two former occasions; on the last of which it was a second time sent back to the arbitrator (*a*), to find specifically whether or not, at the various times when the goods (which were very numerous), were pawned, the defendant made the enquiries of the party pawning as required by the Pawnbrokers' Act (*b*).

(*a*) See 4 N. C. 52; 5 Scott, 304.

(*b*) 39 & 40 G. 3, c. 99. Sec. 6, enacts (*inter alia*), "that every person who shall take, by way of pawn or pledge, any goods whereon shall be lent any sum exceeding five shillings, shall forthwith and *before he* shall or may *advance* or lend *any money* upon such pawn or pledge, enter in a book a description of the goods which he shall receive in pawn; and also the sum to be advanced or lent thereon, with the day of the month and year on which, and the name of the person by whom, such goods are so pawned, and the name of the street and the number of the house, if the same shall be numbered, where such person shall abide, and whether such person is

The arbitrator now found that the goods were pawned with the defendant, as a pawnbroker; that the goods pawned on each occasion were above the value of 5*l.* respectively; that in no one instance was the bankrupt's real name inserted, either in the defendant's books or on the tickets; that, in all but two cases, the defendant had made the requisite enquiries, but in these two cases he had not; that the duplicates delivered by the defendant had only the address of "*Pimlico*," as the residence of the bankrupt, but that he had informed the defendant he did not live in any street; and that, in several instances, there was no entry of the letter "L," or "H," in the books or on the tickets.

Barstow, for the plaintiff.—These omissions on the part of the defendant, are sufficient to entitle the plaintiff to maintain the action. The defendant has been guilty of a breach of duty, imposed by the 6th section of the Act, and, by reason of such breach, he has no lien upon the goods. It may be admitted there is no clause in the Act which says that non-compliance with its requisitions shall make the pledge void; but such is the legal effect of the Act. The 6th section says that the pawnbroker, before he advance any money upon a pledge, shall make the enquiries and entries specified. It may be said that, by the 26th section, a pawnbroker, not complying with the requisitions of the Act, is liable to certain penalties, but such penalties implies a prohibition, *Bartlett* v. *Vinor* (*c*). The object of the Act is in furtherance of public policy, and not, as may be contended, merely to increase the revenue; though where a contract is prohibited, either expressly or by im-

a lodger in, or keeper of, such house, by using the letter 'L,' if a lodger, and the letter 'H,' if a housekeeper; and also the name and place of abode of the owner of such goods, according to the information of the person pawning; *into all which circumstances the pawnbroker is hereby required to enquire of the party pawning, before any money shall be lent or advanced:* and upon every note or memorandum respecting any such pledge, whereon shall be lent any sum exceeding ten shillings, shall be written or printed the number of the entry of such pledge, and every such person shall, at the time of the taking of every pawn, give to the person pawning a note or memorandum, written or printed, containing a description of the goods which he has received in pawn, and also the sum advanced thereon, with the day of the month and year on which, and the name and place of abode, and number of the house, if numbered, of the person by whom such goods are pawned, and whether such person is a lodger or housekeeper, by using the letter 'L,' if a lodger, and the letter 'H,' if a housekeeper, and also the name and place of abode of the owner thereof, according to the information aforesaid, and upon which said note or memorandum shall be written or printed the name and place of abode of the pawnbroker giving the same." By sec. 11, "Persons buying or taking in pledge unfinished goods or linen or apparel entrusted to others to wash or mend, to forfeit double the sum lent, and to forfeit the goods." By sec. 13, "Where goods are unlawfully pawned, the pawnbroker is to restore them." By sec. 23, "The pawnbrokers' names and businesses are to be placed over his door, on penalty of ten pounds." Sec. 26 enacts, "That in case any pawnbroker shall in any wise offend against this Act, every such pawnbroker shall, for every such offence in neglecting to make in such book as aforesaid, any such entry as is required to be made by him, forfeit such sum as to the justice before whom any information thereon shall be heard shall seem reasonable, not exceeding ten pounds; and for every other offence where no forfeiture or penalty is provided, not less than forty shillings, nor more than ten pounds;" and by sec. 30, it is provided always, "that nothing in the Act shall extend to any person who shall lend money upon pawn at the rate of five *per cent.* without taking any further profit."

(*c*) Carth. 252.

plication, any such distinction must now be considered as exploded, *Cope* v. *Rowlands* (*d*), *Armstrong* v. *Armstrong* (*e*). It may also be urged that the pawnbroker here is not seeking to enforce a contract (*f*), and the present action may be likened to the case of a party seeking to relieve himself from a usurious contract, who was formerly held under an obligation to tender all the money really advanced, *Fitzroy* v. *Gwillim* (*g*); but that doctrine has since been assailed and abandoned at the bar, *Wood* v. *Grimwood* (*h*), *Hargreaves* v. *Hutchinson* (*i*); and at any rate it would not apply here, for the act being wrongful, no right can arise out of it.

Petersdorff, for the defendant.—In the first place, the award does not necessarily shew that there has been any violation of the Act; for it is not found that the defendant knew the statements to be untrue, and there must be an illegal intention in order to avoid the contract (*j*); nor does it appear that he intended to take a higher rate than *5l. per cent.* on the goods, in which case the transactions would be within the 30th section, which provides that the Act shall not apply in such cases (*k*).—[*Tindal*, C. J.—The award assumes that fact, for it finds that enquiries were made, and other circumstances, which it would not have been necessary to mention if the case had come within the 30th section: however, if there were any doubt upon that point, it would be better to send the case to the arbitrator to find that fact.—*Barstow*.—The award finds that the goods were pawned with the defendant "as a pawnbroker."]

In *Tregoning* v. *Attenborough* (*l*), which was an action of *trover* against a pawnbroker, it was expressly left to the jury to say whether the defendant had taken more than *5l. per cent.*; at any rate, the plaintiff ought to have shewn a tender of the principal and interest at *5l. per cent.* to entitle him to recover. But supposing this fact were sufficiently found, still, the violation of the provisions of the Act would not deprive the pawnbroker of his lien. There is no analogy between this and such cases as *Barlow* v. *Tattershall* (*m*), and *Nicholson* v. *Chapman* (*n*), for there a lien had never attached; but here a lien has attached at common law upon the loan of the money on a pledge (*o*), and it cannot be divested by inaccurate statements made in the defendant's books, or upon the tickets. In *Higgins* v. *Scott* (*p*), it was held that an attorney's lien was not barred by the Statute of Limitations, although he could not have recovered as plaintiff in an action; so here, though the defendant might not be able to enforce the contract, he has a right to insist upon his lien. A party so doing relies on the security he has in his own hands, and does not require the inter-

(*d*) 2 Gale, 231; 2 M. & W. 149.
(*e*) 3 Mylne & K. 45. As to the old rule, see *Gremare* v. *Le Clerc*, 2 Camp. 144; *Johnson* v. *Hudson*, 11 Ea. 180.
(*f*) See *Simpson* v. *Bloss*, 7 Taunt. 246.
(*g*) 1 T. R. 153.
(*h*) 10 B. & C. 679; 5 M. & R. 551; and see *ib.* 554, n.
(*i*) 2 A. & E. 12; 4 N. & M. 11.
(*j*) See *Nevison* v. *Whatley*, Cro. Car. 501; *Bush* v. *Buckingham*, 2 Vent. 83; *Glassfurd* v. *Laing*, 1 Camp. 149, as to cases of usury: see also *Bowler* v. *Brown*, 4 N. & M. 17, as to an attorney suing for business done when he was uncertificated.
(*k*) See n. *b*, *ante*, p. 419.
(*l*) 7 Bing. 97; 4 M. & P. 722.
(*m*) 4 Russ. & Mylne, 237.
(*n*) 2 H. Bl. 254.
(*o*) See *per Gibbs*, C. J., in *Pothonier* v. *Dawson*, Holt, N. P. C. 385.
(*p*) 2 B. & Ad. 413.

ference of the Court; the cases cited on the other side refer to instances where such interference was necessary. It may be admitted a lien cannot be obtained through a *tortious* act, such as a wrongful taking, but here the goods were originally obtained lawfully. The requisites imposed by the Act are collateral to the contract, and though they may not have been complied with, the contract will remain valid; as in the case of a contract for a loan, where a collateral security is given which is illegal, yet the original contract remains valid, *Kerrison* v. *Cole* (*q*), *Readshaw* v. *Balders* (*r*), *Mouys* v. *Leake* (*s*). There is no clause in the Act to make the non-compliance with the requisitions of the 6th section work a forfeiture of the Pawnbroker's lien; the 11th and 13th sections shew that, in certain cases, the legislature contemplated that the contract should be avoided, and the inference is, that where it is not so enacted, the contract remains valid.—[*Tindal*, C. J.—The enactments contained in the sections referred to were hardly wanted; they relate to the pledging the goods of other parties, which would have been void at common law.]—There is no clause in the Act making a pledge void as between the pawnor and pawnee.

Barstow was heard in reply.

TINDAL, C. J.—I am of opinion that all the contracts, entered into in this case in which the requisites imposed by the 6th section of the Act were wanting, must be held void; inasmuch as such requisites are to precede the contract, and cannot be considered as merely collateral. I think there is a distinction between this case and others where a penalty is imposed by the Act; and that it would be too much to say that a transaction should be void because some of the requisitions of the Act had not been complied with; as, for instance, if the pawnbroker's name were not painted over his door, as required by section 23 (*t*). But the cases provided for by the 6th section are extremely different; it states other duties to be performed by the pawnbroker, he is to make enquiries of the persons pawning, and to make entries, according to their information, in his books and upon the pawn-tickets; and the Statute expressly says that these acts are to be done by him either before or at the time of entering into the contract. This is not merely for the purpose of protecting the parties borrowing money of the pawnbroker, but also to protect third parties, whose property may be pledged without their knowing it, in order to facilitate detection. And I am of opinion that these requisites not having been complied with, the contracts are void, notwithstanding a specific penalty is imposed by the Act in case of such non-compliance. *Cope* v. *Rowlands* goes to that point. Then the question comes to this: whether, if the contract be void, a party can have a lien arising out of it. Let us look to the nature of a lien; it can only arise in three modes: either by express contract, or by the general course of dealing between parties, or by a particular course of dealing (*u*). The two last cases are out of the question here, for the lien which the defendant sets up arises by contract; then, *if the contract is void, the lien arising out of it is also void.* It is

(*q*) 8 Ea. 231.
(*r*) 4 Taunt. 57.
(*s*) 8 T. R. 411.

(*t*) See *Armstrong* v. *Lewis*, 4 Mo. & S. 1; 2 C. & M. 274.
(*u*) *Vide*, *per Bayley*, J., in *Smith* v. *Plummer*, 1 B. & A. 582.

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said, indeed, that there have been cases where, although the contract was void, a party has been allowed to recover; and *Kerrison* v. *Cole*, and *Mouys* v. *Leake*, were cited in support of this proposition. In the first of these cases, it was held that, though a bill of *sale* for *transferring the property* in a ship, by way of mortgage, may be void, as such, for want of reciting the certificate of registry, as required by Stat. 26 *G.* 3, c. 60, s. 17; yet that the mortgagor may be sued upon his *personal covenant* contained in the same instrument for the repayment of the money lent; but there was nothing in that case to impeach the *bonâ fide* contract for the repayment of the money lent; the party had no remedy upon the ship which had been mortgaged, but the common law contract subsisted. So in *Mouys* v. *Leake*, it was held that if, in a deed of grant of a rent-charge by a rector or vicar, out of his benefice (which is void by 13 *El.* c. 20), he also covenant *personally* to pay the annuity, and give a warrant of attorney as a collateral security, the Court would not order the deeds to be delivered up to be cancelled; for there also the contract of loan was good, though the security might be void. If, therefore, in the present case, a good common law contract could be set up, it would be valid, but there is none; and for these reasons, I think the plaintiff is entitled to recover the goods to which the specific objections mentioned in the award apply.

VAUGHAN, J.—I am of the same opinion, and think it cannot be contended that the defendant has a good lien. The 6th section creates a clear condition precedent to the validity of the contract: the defendant was bound to perform the acts required by that section before any legal contract could take place, and he did not perform them. The question then is, what is the effect of the contract. I am of opinion that it is illegal, and that the defendant cannot acquire a lien upon an illegal contract. This case is not distinguishable in principle from *Cope* v. *Rowlands*, and *Foster* v. *Taylor* (*v*), where butter was sold in firkins, not branded according to the provisions of 36 *G.* 3, c. 86, and 38 *G.* 3, c. 73, (which require that makers of vessels for the packing of butter, shall brand them with their names, under a pecuniary penalty, and that sellers of butter shall, under a further penalty, use vessels so branded, and brand their own names), it was held, that an action for the price could not be maintained.

BOSANQUET, J.—I am of the same opinion. From the award, it is clear that these were transactions of loan upon the pledge of goods with the defendant as a pawnbroker; and the question is, whether these transactions are valid. The 6th section of the Act does not contain a prohibition of things collateral to the contract, but an express injunction that certain things shall accompany the contract; now, in such a case, unless the things enjoined are performed, the contract is prohibited by law, and therefore, is illegal and void; and this whether or not there is a penalty attached to the non-performance of them. There may be cases in which the matters prohibited may be wholly collateral to the contract; but it is sufficient for the present case to say that the requisitions of the 6th section cannot be so considered.

(*v*) 5 B. & Ad. 887; 3 N. & M. 244.

COLTMAN, J.—The defendant must, I think, be considered as having lent money on the various occasions mentioned, in the character of a pawnbroker; now a pawnbroker, *primâ facie*, takes usurious interest; he is bound, therefore, to comply with the requisitions of the Act which enables him to take a larger amount of interest; and I think it is clear that the performance of the requisitions contained in the 6th section, (notwithstanding the penalties contained in the 36th), is a condition precedent to the validity of the contract, which would enable him to take the larger amount of interest. The Court would not be forward to make a condition precedent, if it were not expressly so made by the legislature, as I am of opinion it is in this Act; for here the lending the money is prohibited till the preceding regulations are complied with; and therefore, the condition not having been complied with, the contract is invalid.

Judgment for the plaintiff.

In re SMITHERS.

Nov. 15.

The examiners of attornies, under *Reg. Gen., H. T.* 6 W. 4, ought not to refuse to examine a clerk, upon the ground that there is a doubt whether he has served his whole time under his articles.

KELLY, Q. C., moved that the parties appointed to examine persons desirous of being admitted attornies, pursuant to the regulations of *Hil.*, 6, *W.* 4, (*a*), might be directed to examine the applicant, they having refused to do so under the following circumstances: the applicant had been articled to an attorney for five years; during that period he had been assigned to another attorney, whom he served for a fortnight before the instrument of assignment was executed. It was now submitted that such fortnight's service was, in effect, a service under the assignment.

TINDAL, C. J.—Without giving any opinion as to the validity of the service, we think the applicant should be put in a situation to have the question determined. The examiners, therefore, ought to examine him *de bene esse*, and then if the applicant is refused his certificate, he may appeal to the judges, and the question as to the sufficiency of the service, will be properly raised.

Rule granted.

(*a*) 1 Har. & Wol. 637.

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Nov. 23.

Where a bankrupt's estate has not paid 15*s.* in the pound under a second fiat, a third is not a nullity.

Unless the estate of a bankrupt existing at the date of the certificate obtained under a second fiat, shall have actually produced sufficient to pay 15*s.* in the pound, his subsequently acquired estate vests in the assignees under such fiat.

In *trover* by the assignee of a bankrupt (under a second *fiat*), where the defendant obtains a verdict upon an issue, that the plaintiff was not possessed, as of his own property, as such assignee, &c., upon the ground that the bankrupt, at the time of taking the benefit of the Insolvent Act, subsequently to such second *fiat*, was in possession of the goods by the consent of the plaintiff:—*Held*, that the defendant was entitled to the costs of proving a third *fiat* (under which he was assignee), but not to the costs of proving that the bankrupt's estate, acquired *after* the certificate under the second commission, was sufficient to pay 15*s.* in the pound.

Where a cause has been conducted by the clerk of the plaintiff's attorney, and the attorney was subpœnaed and called as a witness:—*Held*, the Master was justified in allowing the plaintiff the costs of the attorney as a witness.

BUTLER *v.* HOBSON (*a*).

THE Court it will be seen, on the former occasion, gave judgment in favour of the defendant on the issues raised by the second and third pleas, but gave no judgment on that raised by the fifth plea.

The Master, in taxing the costs, had disallowed the defendant the expence of the witnesses to prove the third commission (or *fiat*), and the payment of 15*s.* in the pound under the second commission; and he had allowed for the attendance of the plaintiff's attorney as a witness in support of an issue found for the plaintiff, the cause having been conducted by his clerk.

Wilde, Serjt., had obtained a rule *nisi* in *Trinity Term* (11 *June*), to review the Master's taxation; and on a former day in this Term (7th *November*),

Atcherly, Serjt., and *Wightman*, shewed cause (*b*), citing *Fowler* v. *Coster* (*c*), *Till* v. *Wilson* (*d*), *Knight* v. *Woore* (*e*), *Lardner* v. *Dick* (*f*), *Richards* v. *Cohen* (*g*), *Crowther* v. *Elwell* (*h*), and *Cocks* v. *Peachey* (*i*).

Wilde, in support of the rule, cited *Todd* v. *Maxfield* (*j*), and *Knight* v. *Woore*. The Court took time to consider.

TINDAL, C. J., now delivered the judgment of the Court.—Three questions arise in this case, upon the objections made to the Master's taxation of costs.

First, whether the evidence adduced to support the third *fiat* was relevant to the third issue; secondly, whether the evidence to shew that the bankrupt's estate had produced 15*s.* in the pound, was relevant to the same issue; and thirdly, whether the costs of the attendance of the plaintiff's attorney, at the trial, as a witness for the plaintiff, ought to have been allowed.

First, upon the question raised upon the third issue, whether the plaintiff was possessed of the goods as of his property as assignee, it was competent to the defendant to prove that the goods belonged to other persons. For this purpose the third *fiat* was produced in evidence, and it was proved that the plaintiff had permitted the bankrupt to continue in possession of the property, as reputed owner of it. The effect of this evidence was to shew that

(*a*) See this case reported *ante*, p. 93; S. C. 4 N. C. 290; 5 Scott, 798; 6 D. P. C. 409.

(*b*) As the arguments of counsel are fully referred to in the judgment of the Court, it was not thought necessary to repeat them here.

(*c*) 10 B. & C. 427; 5 M. & R. 352.

(*d*) 7 B. & C. 684; 1 M. & R. 580.

(*e*) 3 Hodg. 1; 3 N. C. 534; 4 Scott, 360; 5 D. P. C. 487.

(*f*) 2 C. & M. 389; 2 D. P. C. 333.

(*g*) 1 D. P. C. 533.

(*h*) 1 Horn & Hurls. 187; 4 M. & W. 71; 6 D. P. C. 697.

(*i*) 2 M. & R. 420.

(*j*) 3 B. & C. 222; 5 D. & R. 258.

the property was not in the assignees under the second commission at the date of the third; and consequently, that it was liable to be seised and administered under a new *fiat*. The Court, upon a former occasion, decided that the assignees under the second commission were to be considered as true owners of the goods, who had suffered the bankrupt to retain possession as reputed owner. Whether the right vested in the assignee under the Insolvent Debtors' Court, or in the assignees under the third *fiat*, it was not thought material with respect to the point then before the Court to determine. But it has now become necessary to say, whether any title to the goods can be supported by the assignees under the third *fiat*, against the title of the assignees under the second commission; and upon this point our opinion is, that *the third* fiat *is not a nullity*, as has been contended at the bar; but that the assignees under the second commission, who have allowed the bankrupt to retain possession of the goods as reputed owner, in contravention of the Bankrupt Law, are not in a condition to dispute the title of the assignee under a subsequent *fiat*, to seize and administer them; and such being the case, we think the evidence to support the third *fiat* was relevant to the third issue, and consequently, as to this matter, that the taxation ought to be reviewed. The cases of *Ex parte Bourne* (*k*), before Lord *Eldon*, and the late case of *Ex parte Abbott and another*, before the Court of Review in Bankruptcy (*l*), have not been overlooked by us, but we have not entered into the discussion of the circumstances of those cases, only because the legal effect of reputed ownership upon the rights of the assignees under a third *fiat* was not brought before the Court.

But secondly, the defendants have also insisted upon another ground to maintain their title, viz., that the bankrupt's estate has produced sufficient under the second commission to pay all his creditors 15*s*. in the pound. And upon this point it has been much debated, whether proof that the estate has produced sufficient to pay that amount, will satisfy the exception in the 6 *G.* 4, c. 16, s. 127, unless it has been *paid* to the creditors; and even if it will, whether the estate required to produce the requisite amount is not confined to the estate which was vested in the assignees under the second commission at the date of the certificate. The proviso by which the benefit of the certificate under the second commission is limited to the protection of the person of the bankrupt, unless his *estate* produces a certain amount, was contained in the first act which authorized the grant of a certificate of conformity, viz. 5 *G.* 2, c. 30, s. 9; and is re-enacted in the same identical terms by the 6 *G.* 4, c. 16, s. 127, with this difference only, *viz.* that by the former act it was provided that the *future estate and effects* of every such person (against whom a commission of bankrupt has issued) shall remain *liable to his creditors* as before the making of that act, (the tools, &c. only excepted), *unless* the *estate* of such person, against whom such commission shall be awarded, shall produce clear, after all charges, sufficient to pay every creditor under the same commission, 15*s*. in the pound for their respective debts, whereas, by the latter act, (the 6 *G.* 4, c. 16, s. 127) it is provided that unless his estate shall produce sufficient, &c. (as in the 5 *G.* 2,) his future estate and effects (except his tools, &c.) shall *vest in the assignees* under the said commission, who shall be entitled to seize the same, in like manner as

(*k*) 2 Glyn. & Jam. 137. (*l*) 1 Deac. 479.

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they might have seized property of which such bankrupt was possessed at the issuing the commission. Under the former Act the future estate and effects *were made liable to the creditors*, who notwithstanding the certificate were authorized to sue the bankrupt; under the latter Act, the future estate and effects *are vested in the assignees*. Under the former Act, therefore, the assignees had no right to seize the property of the bankrupt acquired subsequently to the certificate, *Hovil* v. *Browning* (*m*), *Ex parte Hodgkinson* (*n*). Under the latter, the estate and effects subsequently acquired, being vested in the assignees, the individual creditors are excluded from all right of suit. But there seems to be no reason for holding, that the "estate and effects," spoken of in the former Statute, by which estate and effects the requisite amount is to be produced, is not the same "estate and effects" spoken of in the latter Statute. There is nothing which indicates an intention to vary the proviso of restriction in that respect. Under the former Act it is clear that the "estate and effects" required to produce sufficient to pay 15*s.* in the pound to all the creditors, is something different, and therefore distinguishable from the "*future estate and effects*" made liable to the creditors; for under that Statute, the "estate and effects" spoken of, are the estate and effects to be administered under the commission, but the assignees could not seize any property acquired subsequently to the certificate, for the purpose of making a dividend; though each individual creditor might sue for his own debt. If the estate and effects, liable to be administered under the commission, had actually produced sufficient to pay 15*s.* in the pound, the bankrupt would be entitled to the full benefit of his certificate, and, as it appears to us, equally so, whether the commissioners had thought fit to make a dividend of it or not. But as no alteration has been made by the 6 *G.* 4, in that part of the language of the Statute 5 *G.* 2, which speaks of the "estate and effects" which are to produce the requisite amount, *the certificate will not exempt the bankrupt's "future estate and effects" from the claim of his assignees* to seize it under the latter Act, *unless the "estate and effects" of the bankrupt existing at the date of the certificate, shall have actually produced sufficient to pay* 15*s. in the pound.* In the present case, although the estate and effects of the bankrupt, acquired subsequently to his certificate, may have produced sufficient to pay all his creditors under the commission 15*s.* in the pound, it is not contended that such amount was produced by the estate and effects which existed at the date of the certificate. The evidence, therefore, which was provided on this point, would not support the title of the assignees under the third *fiat*, upon the ground that the bankrupt had become absolutely entitled to the property which he had acquired subsequently to his certificate; and consequently it was not relevant to the matter of the third issue, and the costs of such proof ought not to be allowed.

Thirdly, with respect to the third objection, the court do not see sufficient reason to think that the Master has exercised an unsound discretion, in allowing the costs of the attendance of the plaintiff's attorney as a witness, and are, therefore, of opinion that the taxation in respect of that matter ought not to be disturbed.

Rule absolute on 1st point; discharged on 2d and 3d points.

(*m*) 7 Ea. 154.

(*n*) 19 Ves. 291; G. Cooper, 99; S. C. 2 Rose, 172.

CLARKE *v.* GOLDING.

Common Pleas.

Nov. 26.

Where a defendant has objected to receive a notice of trial, as being insufficient, he cannot afterwards rely upon it to entitle him to judgment, as in case of a nonsuit.

ISSUE was joined, and notice of trial given on the 18th *June*, for the Sittings after *Trinity Term*. The defendant's attorney refused to accept such notice, on the ground that it was too late. The plaintiff then gave notice of trial for the first Sittings in this Term, and having failed to proceed,

Wightman had obtained a rule *nisi* for judgment, as in case of a nonsuit.

Peacock shewed cause.—The present application is made too soon, as the default was only committed this Term, for which notice of trial was given, *Gripper* v. *Lord Templemore* (*a*). And besides the defendant had no right to apply till two Terms after issue joined, *Gough* v. *White* (*b*). The plaintiff was not bound to proceed under the first notice, *Ranger* v. *Bligh* (*c*).

Wightman.—The cases cited are distinguishable from the present. Here the defendant has a right to fall back upon the first notice of trial in *June*.

Per Curiam.—He cannot do so, as he objected to receive it.

Rule discharged.

(*a*) 1 Will. Wol. & Dav. 65; 5 D. P. C. 408; see also *Preedy* v. *Macfarlane*, 2 C. & M. 213; 2 D. P. C. 216.

(*b*) 1 Mur. & Hurl. 157; 2 M. & W. 363.

(*c*) 2 Har. & Wol. 299; 5 D. P. C. 235.

REEVES *v.* CAPPER and another.

Nov. 26.

1. Where *A.* pledges a chattel with *B.*, and pursuant to an agreement made between them at the time, *A.* has the possession of it for a limited period, for the use of *B.*; and at the end of such period it is returned to its ordinary place of custody, *B.* does not forfeit his lien; the possession of *A.* being, in such case, the possession of *B.*

2. Where a chattel is pledged under a written agreement, not under seal, although such agreement is immaterial as to the question of property, it may prove the object of the pledge, and the nature of the interest intended to be passed.

3. *W.*, the master of a ship, pledged his chronometer with the defendants, the owners of the ship, under a written agreement, stating the pledge to be made in consideration of an advance of money, upon the condition that *W.* should have the use of it during an intended voyage. The chronometer was taken by *W.* from the custody of the maker, where it was at the time of the pledge, and handed over to the defendants' agent, by whom it was re-delivered to *W.*, who took it with him upon the voyage. On his return he again deposited it with the maker, and afterwards pledged it to the plaintiff, an attorney, in consideration of his withdrawing an execution against him; and the maker, in ignorance of the pledge to the defendants, agreed to hold it for the plaintiff:—*Held*, that the property remained in the defendants.

THIS was an issue directed to be tried by this Court under the Interpleader Act, for the purpose of ascertaining whether a certain chronometer was the "property" of the plaintiff or defendants. At the trial, before *Coltman*, J., the following facts appeared in evidence:—

Wilson was the owner of the chronometer, and the master of the ship

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Don Giovanni, of which the defendants were the owners. *Wilson* being about to proceed on a voyage, wished to obtain an advance of money from the defendants, which they agreed to make upon the security of the chronometer (then in the custody of Messrs. *Barraud*), and on the 23d *December*, 1836, the following document, directed to the defendants, was signed by *Wilson*, and delivered by him to them:—

"Gentlemen,

"In consideration of your advancing me 100*l.* on account of this voyage, instead of the usual sum of 50*l.*, I hereby make over to you, as your property, until the same sum is repaid, my chronometer and all my nautical instruments now on board the *Don Giovanni*, consisting of as per annexed list, valued, as they cost me, 119*l.* 13*s.*, you allowing me the use of the same for this voyage." [Then followed a list of the instruments, with the prices annexed.]

This document was duly stamped.

The advance of 100*l.* was thereupon made by the defendants to *Wilson*. In a day or two afterwards, when *Wilson* was about to proceed on the voyage, he went with the clerk of Messrs. *Capper*, to *Barraud's*; the clerk remained outside, and *Wilson* went into the shop and took the chronometer; he then went out and put it into the clerk's hands, who kept it while they walked together to the *Spread Eagle*, in *Gracechurch-street*, where he returned it to *Wilson*, who took it on the voyage. On his return home, in *July*, 1837, the nautical instruments were left in the ship, but the chronometer was taken to *Barraud's*, as it appeared, by the ship's mate. In *August*, 1837, the plaintiff, an attorney, levied an execution under a writ of *fi. fa.* against *Wilson*, at the suit of one *Wade*; and finding *Wilson* in great distress, he undertook to withdraw the execution and settle with his own client, upon *Wilson's* making over the chronometer to him, the plaintiff, as a security; whereupon *Wilson* signed the following document, addressed "To Mr. *Barraud* & Son."

"Gentlemen,

"Please to deliver to Mr. *Charles Reeves* my chronometer, No. 22, which his clerk will explain the reason for so doing. It will remain in your hands, as his property, until the arrangement of some little transaction between us; therefore you will keep her still agoing, as I shall have it replaced in my name in a few days."

This paper had no stamp. The plaintiff's clerk took it to Messrs. *Barraud* (who had no notice at that time of the previous transaction between *Wilson* and the defendants), and they undertook to hold the chronometer for the plaintiff, and to transfer it in their books to his name from that of *Wilson*, in which it was entered. The plaintiff, however, was not satisfied with this, and sent his clerk again to take possession of the chronometer; and according to the clerk's own statement, he went and asked to look at the chronometer, which was put into his hands by *Barraud's* clerk, and returned again; *Barraud's* clerk, however, denied that any thing was said on the occasion. After this, some time in *October* or *November*, Messrs. *Barraud* had notice of the transaction between the defendants, and *Wilson*; and the name "*Capper*," was written in pencil against the number of the chronometer, which, up to that time, still stood in *Wilson's* name.

The jury, under the direction of the judge, returned a verdict for the plaintiff, finding specially that the plaintiff had given the first notice to *Barraud*,

but leave was reserved to the defendant to move to set it aside, and have the verdict entered for himself.

Wilde, Serjt., in *Easter Term*, obtained a rule *nisi* accordingly, upon four points; first, that the order of *August*, 1837, had no stamp; secondly, that there was no consideration expressed on the face of the order; thirdly, that there was none in fact; and fourthly, that the chronometer was not the "property" of the plaintiff, within the terms of the issue (*a*).

Kelly, Q. C., and *Petersdorff*, in this Term shewed cause.—The property in the chronometer clearly vested in the plaintiff by the order of 24th *August*, 1837 and the delivery to his clerk, unless this transaction were overridden by the previous one with the defendants, in *December*, 1836. That cannot operate as an *assignment* of the chronometer, as it was not accompanied by actual delivery, *Reed* v. *Blades* (*b*), *Irons* v. *Smallpiece* (*c*), *Ryal* v. *Rolls* (*d*). At most, then, the transaction could operate as a pledge, so as to confer a lien on the defendants; but the giving up the chronometer to *Wilson* during the voyage was a forfeiture of such lien.—[*Tindal*, C. J.—We must see *quo intuitu* it was given up to *Wilson*. That seems to be the very point in the case. Was not *Wilson* the servant of the defendants; and did he not have possession of the chronometer in that character? Suppose the servant of a farmer, owing him money, were to pledge a horse with him, and the servant were afterwards to use the horse for his master on the farm, would that be a forfeiture of the lien?]—Admitting, then, that the possession of *Wilson* was the possession of the defendants during the voyage, still there is no re-delivery of the chattel to the defendants after the voyage is over; the chronometer is returned by *Wilson* to Messrs. *Barraud*, and is held by them for him; the defendants not in any manner interfering. Their lien, therefore, was gone, in the same way as if a factor, having a lien upon goods, deliver them to his principal to sell, and the sale goes off; if the factor does not reclaim them, his lien is lost, *Kinloch* v. *Craig* (*e*). At the time, therefore, of the transaction between the plaintiff and *Wilson*, the chronometer was in the uncontrolled possession of the latter; and as there was a good consideration for the transfer to the plaintiff, his title is fully established.

Wilde and *Talfourd*, Serjts., in support of the rule.—Absence of possession does not invalidate a mortgage of a chattel, nor does it constitute fraud as against creditors; it is only evidence to go to the jury, *Martindale* v. *Booth* (*f*). It is only where the pledge or sale of a chattel is *absolute*, that it is void if not accompanied by possession in the transferee, *Edwards* v. *Harben* (*g*): but if the possession of the transferor is consistent with the terms of the original contract, the transfer is valid, *Reed* v. *Wilmott* (*h*). But here in fact, there was a change of possession, the chronometer having been handed over to the defendant's clerk before the voyage. The re-delivery to

(*a*) The first of these points was not insisted on in argument; and the judgment of the Court renders it unnecessary to repeat the argument on the second and third.
(*b*) 5 Taunt. 212.
(*c*) 2 B. & A. 551.
(*d*) 1 Atk. 165; 1 Ves. Sen. 348; 1 Wils. 260.
(*e*) 3 T. R. 119, 783.
(*f*) 3 B. & Ad. 505.
(*g*) 2 T. R. 587.
(*h*) 7 Bing. 577; 5 M. & P. 553.

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Wilson was only qualified; *Ogle* v. *Atkinson* (*i*), the possession by him during the voyage was, therefore, the possession of the defendants; and the possession by *Barraud*, after the voyage, was still their possession, for the chronometer was there only as in a place of general custody. At any rate, there was no delivery to the plaintiff: and therefore, upon the doctrine that a transfer of a chattel without change of possession is void, he has no title.

Cur. adv. vult.

TINDAL, C. J., now delivered judgment.—The question which has arisen upon the motion for setting aside the verdict in this case appears to us to turn entirely upon the legal effect of the contract under which the chronometer was delivered by *Wilson*, the then owner, to Messrs. *Capper*, on the 23d *Dec.* 1836. And it appears to us, upon the evidence, that Messrs. *Capper*, by the delivery of the chronometer to their clerk on that day, upon the terms of the special contract entered into between *Wilson* and them, acquired the legal property in the chronometer, to be held by them as a security for the repayment of 50*l.*, and that *Wilson* had nothing left in him but the reversionary property in the chronometer, to come into possession after such repayment had been made.

The chronometer was delivered to Messrs. *Capper*, and it was delivered for a valuable consideration; and this distinguishes the present case from those in which it has been held, that a verbal gift of chattels, unaccompanied with delivery of possession, passes no property to the donee, *Reed* v. *Blades*, *Irons* v. *Smallpiece*. Further, the chronometer was delivered under a written agreement; and although such agreement not being under seal, that circumstance becomes immaterial as to the question of property; yet being a written agreement, it proves with precision and accuracy the object of the delivery, and the nature of the interest intended to be passed. "In consideration of your advancing 100*l.* instead of 50*l.*, I hereby make over to you, *as your property*, until that sum be repaid, my chronometer, &c., *you allowing me the use of the same for this voyage.*" At the moment, therefore, of the delivery to Messrs. *Capper's* clerk, the property vested in Messrs. *Capper*, for the purpose and upon the condition mentioned in the written agreement; which condition has never been performed by repayment of the money.

Then arises the point upon which the plaintiff rests his claim to the chronometer, under the subsequent pledge to him for a valuable consideration, namely, that the possession of the chronometer having been afterwards parted with by Messrs. *Capper*, and restored, as it is contended, to Captain *Wilson*, the property of Messrs. *Capper* in it was entirely lost, either on the principle that the agreement with Messrs. *Capper* must be held fraudulent and void, as possession did not accompany it; or upon the ground, that where the party to whom a personal chattel is pledged, parts with the possession of it, he loses all right to his pledge. As to the first objection to the title of the defendants, the want of possession, under the agreement, can, at the utmost, amount to no more than a ground of fraud to be submitted to the jury; and no such question was made at the trial; and indeed the answer to the objection is sufficiently obvious, that the parting with the possession followed, and was consistent with the very terms and provisions of the agreement itself. And as to the second point, we agree entirely with the doctrine laid down in *Ryall* v. *Rolle*, that in the case of a simple pawn of a personal chattel, if the

(*i*) 5 Taunt. 759.

creditor parts with the possession, he loses his property in the pledge. But we think the delivery of the chronometer to *Wilson* under the terms of the agreement itself, was not a parting with the possession; but that the possession of Captain *Wilson* was still the possession of Messrs. *Capper*. The terms of the agreement were, that "they would allow him the use of it for the voyage;" words that gave him no interest in the chronometer, but only a licence or permission to use it for a limited time, whilst he continued their servant, and employed it for the purpose of navigating their ship. During the continuance of the voyage, and when the voyage terminated, the possession of Captain *Wilson* was the possession of Messrs. *Capper;* just as the possession of plate by a butler, is the posession of the master; and the delivery over to the plaintiff was, as between Captain *Wilson* and the defendants, a wrongful act, just as the delivery over of the plate by the butler to a stranger would have been; and could give no more right to the bailee, than Captain *Wilson* had himself. We, therefore, think the property belonged to the defendants; and that the rule must be made absolute for entering the verdict for the defendant.

Rule absolute.

BOTTOMLEY *v.* FORBES.

Nov. 26.

ASSUMPSIT for freight on a charter-party, dated 23 *May*, 1836, by the terms of which the defendant (the shipper) was to pay 4*l.* 15*s.* per ton for all goods shipped at *Bombay* for *London; cotton to be calculated at 50 cubic feet per ton*, and all other goods according to the *East India* Company's scale of tonage. The defendant had paid 1,686*l.* into Court, upon the calculation hereafter mentioned.

At the trial before *Coltman*, J., at *Guildhall*, the Sittings after last *Hilary Term*, the following facts appeared:—The defendant shipped at *Bombay* 1,575 bales, and 32 half-bales of cotton, which arrived and were landed in *London*, in *June*, 1837; previously to the bales being shipped, they were compressed in an extremely powerful hydraulic screw, by means of which a bale of 12 cubic feet was reduced to 1 foot 5 inches. The bales while in the press were bound or lashed round, and when released, they expanded more or less according to the strength of such lashings; but the average expansion was about 15 per cent., in about 24 hours after they came from the screw. After its shipment in the hold, the cotton was incapable of further expansion; but upon its being landed, in consequence of the lashings being loosened, a still further expansion took place, averaging about 20 per cent., upon the original bulk as it came from the screw. The cotton in question had been measured immediately it came from the screw, taking the average of 1 bale in every 10, and at the calculation of 50 *cubic feet per ton*, amounted to 355 tons odd, which was the amount inserted in the bill of lading, and upon which the defendant had paid money into Court. Upon its arrival in *London*, the cotton, upon the same calculation, amounted to 453 tons odd, being a difference of 98 tons.

In an action upon a charter-party for freight upon goods shipped at *Bombay* for *London*, stating that cotton was to be "calculated at *fifty cubic feet per ton*," *Held*, that evidence was admissible, *first*, on the part of the defendant to show a usage in the trade, that the measurement was to be calculated when the cotton was taken from a screw at *Bombay*, though it appeared that it afterwards expanded considerably before it was shipped, and again when it was unloaded at the port of delivery; *secondly*, on the part of the plaintiff, to show that the captain of the vessel refused to receive the cotton according to such measurement, and that he measured it when on board, and delivered an account of such measurement to the shippers.

A statement by a judge to the jury, that in his opinion a usage has been proved, is not a misdirection.

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The question between the parties was, at what rate of measurement the above calculation was to be made, the plaintiff contending that it was to be made according to the bulk of cotton at the port of delivery, or at any rate, at the time of shipment: the defendant, on the other hand, contending that there was a usage in the trade, by which the measurement was to be calculated at the time it came from the screw; and he offered evidence of such usage accordingly. This was objected to on behalf of the defendant by *Wilde*, Serjt.; who cited *Moller* v. *Living* (*a*). The evidence, however, was admitted by the learned judge.

The witness, who was called to prove the usage, stated, that the general course was to pay freight at the rate of 50 cubic feet to the ton, according to the measurement at the screw; but he also stated upon cross-examination, that the pressure by the hydraulic screw was of recent introduction; that formerly the cotton had been compressed by means of hand screws, which were by no means so powerful, and that since the introduction of the hydraulic screw, it had been found necessary to remodel the scale of the *East India* Company; and that the new scale was to come into operation on the 7th of *April*, after the shipment in question. He also stated that there were three modes of calculating the tonage; first, by taking fourteen hundred weight to the ton; secondly by taking four bales and a half to the ton; and, thirdly, by calculating 15 cubic feet to the ton, as in this instance; that frequent disputes had arisen as to the mode of measuring cotton, principally depending upon the question whether or not the measurement was to be taken by placing the callipers over the ropes or lashings. At the close of the defendant's case, *Wilde*, Serjt., proposed to call the captain, for the purpose of proving, first, that he refused to receive the goods according to the measurement of the screw, and secondly, to prove the measurement of the cotton when it was shipped, and that he had delivered an account of such measurement to the shippers; but this evidence being objected to on the part of the defendant, it was rejected.

The learned judge in summing up, told the jury that in his opinion the usage was proved, and they found a verdict for the defendant.

Wilde, Serjt., in *Easter Term*, moved, to set aside this verdict, and for a new trial, on the grounds, first, that the evidence of usage was improperly received; secondly, that the evidence offered by the plaintiff in reply, was improperly rejected, and thirdly, that the learned judge had misdirected the jury as above. The Court granted a rule *nisi* upon the first and second points, but refused it for misdirection, upon the ground that the statement made by the learned judge amounted to no more than saying, that one question in the case was, whether the usage had been proved, and that it seemed to him it had been.

Sir *W. W. Follett*, Q. C., and *R. V. Richards*, on a former day in this Term, shewed cause.—The question turns upon the construction of the charter-party, and as there is no place therein mentioned at which the measurement was to be calculated, evidence was admissible to shew the usage by which the measurement was to be taken at the screw at *Bombay*.—[*Tindal*, C. J.—According to the rules of good sense, it would seem that the cotton ought to be measured according to the actual space it occupied in the ship, unless there were an established custom to the contrary. The use of

(*a*) 4 Taunt. 102.

the hydraulic screw is shown not to have been an old custom.]—It was as old as the method of taking the tonage by measurement (*b*). There is no rule of law by which the measurement is to be taken according to the space occupied in the vessel; and it is clear that a mercantile contract may be explained by a known usage of trade according to the principle laid down in 2 *Phillips on Evidence*, 738, 764 (*c*), *Haynes* v. *Halliday* (*d*), *Bold* v. *Rayner* (*e*), *Benson* v. *Schneider* (*f*), *Donaldson* v. *Foster* (*g*), *Taylor* v. *Briggs* (*h*). In *Gibbon* v. *Young* (*i*), which was an action on a charter-party for freight, in which the freighter covenanted to pay freight at a certain rate *per* ton, *freight admeasurement*; pleas setting up a usage of the trade, that an account for the freight admeasurement should be produced to the freighter before the freight was payable, were held bad on demurrer, upon the ground that the terms of the usage pleaded varied the terms of the original contract; and that the usage if good, was matter of evidence, and should not have been pleaded; but the Court in that case distinctly recognized the principle, that a written mercantile instrument may be explained by usage (*j*). In *Moller* v. *Living*, cited on the other side, the Court held that evidence of usage was properly excluded, because there was no ambiguity in the contract, which is not the case here. The question in this case is, what is meant by "50 cubic feet per ton?" and evidence is as admissible to explain that, as to explain the meaning of the term "one thousand rabbits" in a lease of a warren (*k*). Then, as to the evidence offered in reply, it was properly rejected; for it was not offered to contradict the custom, but merely to shew that the Captain had refused to receive the cotton according to the *Bombay* measurement, which could clearly have no bearing upon the meaning of the contract between the parties.

Wilde, Serjt., and *Martin*, in support of the rule.—By the usual terms of the charter party, the owner is to take on board a full and complete cargo, not exceeding what the ship can reasonably carry; the size of the ship, therefore must be the basis of the remuneration. The argument on the other side would go to shew, that if by the means of a more powerful screw, they could compress a bale of cotton to the size of a nutmeg, and by its subsequent expansion it were to occupy a space of 10 feet in the hold, the owner was to be paid at the rate of calculating a bale at the size of a nutmeg. The rule is not disputed, that commercial instruments are to be construed according to the usage of trade, but that rule is only applicable where there is a latent ambiguity in the instrument; that is, where the ambiguity arises out of extrinsic matter (*l*), as in the case of the use of the word *bale* (*m*); or in a warranty to depart with convoy, evidence may be admitted to shew the place where, according to mercantile usage, the ship was to be joined by convoy (*n*). If there have been any cases in which it has been held that unambiguous expres-

(*b*) A mercantile usage may be good, though it has only been established for a year, *Noble* v. *Kennoway*, 2 Doug. 510. So, if it be general, though not uniform, *Vallance* v. *Dewar*, 1 Camp. 503.
(*c*) Last edit.
(*d*) 7 Bing. 587: 5 M. & P. 572.
(*e*) 1 M. & W. 343; 2 Gale, 44.
(*f*) 7 Taunt. 272.
(*g*) Abbott on Shipping, 222.
(*h*) 2 C. & P. 525.
(*i*) 2 Moo. 224.
(*j*) V. per *Gibbs*, C. J., p. 233; and per *Dallas*, J., p. 234.
(*k*) See *Smith* v. *Wilson*, 3 B. & Adol. 728.
(*l*) See 2 Star. Ev. 546, 547.
(*m*) See *Taylor* v. *Briggs*, *ut supra*.
(*n*) See *Lethulier's Case*, 2 Salk. 443.

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sions in a contract were capable of explanation, it is submitted that they are not warranted by law. Neither a usage of trade or a local custom can be called in to controul or vary the ordinary meaning of language (*o*), as in *Noble* v. *Durell* (*p*), where it was held that a custom, that every pound of butter sold in a particular market town should weigh 18 ounces, was bad. And although where a policy of insurance refers to a particular trade, evidence of the usage of that trade is admissible, it is not so otherwise, and a party cannot call a witness to explain the expressions of a policy, where they are quite clear; as, where a policy of insurance expressed that the insurance was on the ship till moored twenty-four hours, and on the goods till *safely landed*; evidence to shew a usage that the risk on the goods as well as on the ship expired in *twenty-four hours* was held inadmissible, *Parkinson* v. *Collier* (*q*). Upon the same principle it has been held, that on a warranty of primed singed bacon, evidence is not admissible of a practice in the trade to receive bacon to a certain degree tainted as primed singed bacon, *Yates* or *Yeats* v. *Pim* or *Pym* (*r*). The same principle was acted upon in *Parkinson* v. *Lee* (*s*), and *Cuff* v. *Penn* (*t*). The case of *Donaldson* v. *Forster* certainly goes a monstrous length, and it has been impeached by Mr. *Starkie*, in his work on Evidence (*u*). In *Haynes* v. *Halliday*, the question was as to the proper method of stowing a boat on board a ship; and the decision merely goes to shew that the boat was not to be taken on board in such a state as to impede the navigation of the ship. In *Bold* v. *Rayner*, there was a contract to deliver goods from a ship, and there was a variance between the bought and sold notes, in one of which it was stated that the delivery was to be from ship A. *or* ship B.; and in the other from ship A. *and* ship B.; and evidence was admitted to shew that by mercantile usage both these expressions had the same meaning; for it was clear, it was the intention of the parties that the goods should be delivered somehow. In *Benson* v. *Schnedier*, the contract was to load a full and complete cargo of cotton, and evidence was admitted to shew that the cotton in question was not packed in a fit way for shipping; the Court therefore only gave effect to the contract. In *Taylor* v. *Briggs* there was a latent ambiguity in the meaning of the word *bale*, which required explanation. *Gibbon* v. *Young* is a strong authority for the plaintiff, to shew that no new terms will be introduced to vary a contract. In this case there is no dispute that 50 feet are to be taken as a ton. There is no ambiguity in the contract to let in parol evidence of any usage to control it; and besides the usage attempted to be set up is singularly vague and uncertain. It appears that formerly hand-screws were used: the hydraulic screws now in use may, in their turn, be superseded by some new machine of still greater power; or even at present, one screw may be of greater power than another. The expansive power of the cotton is also shewn to vary with the different strength of the lashings used to tie up the bale. Although the contract was not in express terms that freight should be calculated at the port of delivery, yet that was the reasonable basis of calculation. Suppose it were a cargo of tobacco, or of any other commodity which might diminish in bulk or weight

(*o*) 2 Star. Ev. 566.
(*p*) 3 T. R. 271.
(*q*) Park on Insur. 740, 7th edit.
(*r*) Holt's N. P. C. 95: 2 Marsh. 141; 6 Taunt. 446.
(*s*) 2 East, 313.
(*t*) 1 M. & S. 21.
(*u*) Vol. 2, 567, n.

during the voyage, the freight would be payable only on the quantity actually delivered. It is notorious that, in the *West India* trade, molasses is never of the same weight when delivered, as when received on board; but it is paid for according to the amount delivered (*v*). Suppose the case of a man covenanting to pay twenty quarters of corn by way of rent, would he be permitted to give in evidence a usage, that a payment of fifteen quarters was sufficient, because the corn had shrunk? The result of the present custom would be, that no certain quantity is represented by the quantity mentioned in the contract.

Then, the evidence that was rejected should have been admitted, for the captain was called, not only to prove the measurement when the cotton was shipped, which was a fact material to the question, but also to disprove the usage which had been set up, by shewing the varying nature of the measurements.

TINDAL, C. J. (after consulting with the other judges).—It is shewn in evidence that the bulk varies on three occasions; first, when it comes from the screw; secondly, when it is put on board; and thirdly, when it is unloaded. The contract is silent as to which admeasurement is to be taken; and the first question is, whether evidence of the usage in the trade may not be admitted, to shew what the parties really meant. Upon this point the Court do not entertain any doubt that the evidence was properly admitted; but upon the other point, as to the rejection of the captain's evidence, we feel some difficulty, and upon that we will take time to consider.

HIS LORDSHIP now gave judgment.—At the conclusion of the argument in this case, we stated our opinion, that, so far as related to the first objection, we thought the case fell within the general rule, that, *where a doubt is raised by evidence upon the meaning of a mercantile contract, evidence is admissible of the usage or course of trade at the place where the contract is to be carried into effect, to explain or remove such doubt;* and we still continue of that opinion, and hold the evidence, which was given by the defendant at the trial of this cause, to be admissible.

But with respect to the evidence tendered by the plaintiff in the way of reply, we think such evidence ought to have been received. For, it appears to us, the evidence tendered had a direct bearing on the point, whether the usage set up was a reasonable usage or not. Evidence of the extent of the difference between measurement on the merchant's premises, and measurement at the time of shipment, might be material to enable the judge to form his opinion upon the reasonableness of the usage; and if the usage should appear to be in a high degree unreasonable on this account, such evidence might also have weight with the jury on the question, whether the usage did or did not exist in fact.

We think, therefore, upon this ground, the cause must go down again to a new trial.

Rule absolute.

(*v*) See Abbott on Shipping, Part 3, ch. 7, s. 7, p. 292-299, 5th ed.

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1. As between principal and surety, if any material part of the transaction between the creditor and his debtor (in respect of which the surety enters into his engagement) is with the knowledge or assent of the creditor, misrepresented to the surety, (the misrepresentation being such, that but for the same the suretyship would not have been entered into, or being entered into, the extent of the surety's liability *may* thereby be increased), the security given by the surety is not available against him, on the ground of fraud.

2. The liability of the maker of a promissory note, given to secure the debt of a third party, is the same as that of a party who gives a regular guarantee.

3. *A.* (being in partnership with *B.*) was indebted to the plaintiffs on his private account in 800*l.*, and it was agreed that the plaintiffs should lend 2,600*l.* to *A.* and *B.*, upon the security of a mortgage and of a promissory note to that amount, to be given by a third party; and that the 800*l.* should be deducted out of the 2,600*l.* In the mortgage deed was a recital (which was untrue in fact,) that the 800*l.* had been paid: the defendant gave his joint and several note for the 2,600*l.* and at the time of making it, the recitals of the deed were read over in his presence by the plaintiffs' agents:—*Held*, that this amounted to a fraud in law, and that the note given by the defendant was thereby rendered unavailable against him.

4. Upon the argument of a special case, where the verdict is entered for the plaintiff, he is entitled to begin, though by the pleadings the issue may be upon the defendant.

STONE and others *v.* COMPTON.

ASSUMPSIT; tried before *Tindal*, C. J., at the Sittings after *Hilary Term*, 1837, when a verdict was found for the plaintiffs, for the sum of 3000*l.*, subject to the opinion of the Court upon the following case:

The declaration contained two counts. The first on a promissory note, dated the 25th *November*, 1831, whereby the defendant promised to pay to plaintiffs and *John Martin*, since deceased, or order, on the 22d *November*, 1832, 2600*l.* with interest, and to pay the interest half yearly. Second count, upon an account stated.

The defendant pleaded, first (to the first count), that he was induced to make the promissory note, and the same was obtained from him, by the fraud, covin and misrepresentation of the plaintiffs and *J. M.* and others, in collusion with them.

Secondly, (to the same), except as to 1671*l.* 8*s.* parcel, &c., and interest thereon, that before and at the time of the making of the note, certain persons, to wit, *Leonard Streate Coxe*, and *George Chambers*, were desirous of borrowing of the plaintiffs and *J. M.* a large sum, to wit, 2600*l.*, and the plaintiffs and *J. M.* proposed to lend the same, upon certain securities being given them for the re-payment thereof with interest; and amongst other securities, upon the security of the said note, to be therefore made and signed by the defendant, as surety of and for the said *L. S. C.* and *G. C.* in that behalf, and thereupon the said note was made by the defendant, as surety of and for *L. S. C.* and *G. C.* and as security for the re-payment of such sum not exceeding 2600*l.*, as should be then, *viz.*, at the time of making the said note and giving such other securities, lent and advanced by the plaintiffs and *J. M.* to *L. S. C.* and *G. C.*, with interest; and upon the terms and faith that the plaintiffs and *J. M.* should and would, upon the said note being made and the said securities being given and executed, advance and lend to *L. S. C.* and *G. C.* such sum of 2600*l.*, and that the defendant should not be liable on the said note, except for such sum as the plaintiffs and *J. M.* should then lend and advance to *L. S. C.* and *G. C.* on the said securities; and the defendant then made the said note upon the said terms, and not otherwise, or upon any other consideration. And the defendant avers that all the said securities, including the said note, were then made, executed and delivered to the plaintiffs and *J. M.*, upon the terms aforesaid, and the plaintiffs and *J. M.* then received the note, upon the terms and consideration aforesaid, and that there never was any other consideration for the making of the said note: that at the time of and upon the making and executing and delivering to the plaintiffs and *J. M.*, of the said securities, including the note as aforesaid, they advanced and lent to *L. S. C.* and *G. C.*, a much less sum of money than 2600*l.*, to wit, 1671*l.* 8*s.*, and no more, and forbore

then to lend or advance to *L. S. C.* and *G. C.* any further part of said 2600*l.* without the defendant's knowledge or consent, and that there never was any consideration for the payment of said note or any part of the amount thereof, except as to the said 1671*l.* 8*s.*, with interest thereon, and the plaintiffs did not, at the time of the commencement of this suit, hold the said note for or upon any consideration, except as to said 1671*l.* 8*s.* parcel, &c., and interest thereon.

Thirdly, (to the same), that the defendant made the said note as security for certain persons, to wit, *L. S. C.* and *G. C.*, and in order to secure monies to be paid by them to the plaintiffs and *J. M.*, and that after the death of *J. M.*, and before the commencement of this suit, *L. S. C.* and *G. C.* paid and satisfied monies to the amount of all monies in the note mentioned, together with all interest due thereon, and that the plaintiffs received the same in full satisfaction and discharge of the cause of action in the first count mentioned.

Fourthly, as to 932*l.* 11*s.* 3*d.* parcel, &c., in the first count mentioned, that before and at the time of the making the note, *L. S. C.* and *G. C.* were co-partners in trade, and that the defendant made the note *as surety of and for* L. S. C. *and* G. C.; and the plaintiffs and *J. M.*, since deceased, then accepted and received the same as a collateral security for the re-payment of a large sum, to wit, 2600*l.*, to be lent and advanced by the plaintiffs and *J. M.*, since deceased, to *L. S. C.*, and *G. C.*, and not upon any other consideration; and the defendant made the said note upon the terms, that in case the plaintiffs and *J. M.*, or any or either of them, should, by virtue of the deed hereinafter mentioned, sell the tenements and policies hereinafter mentioned, the defendant should be relieved from liability on the said note, to the extent of the monies which on such sale should be received by them or any or either of them, in satisfaction of the amount of the said note, or any part thereof, so far as the same might extend and be applicable to the said note. And the defendant avers that before the making of the said note, *L. S. C.* and *G. C.* had applied to and requested the plaintiffs and *J. M.*, since deceased, to lend and advance to them, *L. S. C.* and *G. C.*; and the plaintiffs and *J. M.* then agreed to lend to *L. S. C.* and *G. C.* 2600*l.*, upon the security, not only of the said note, but also upon the security and on the terms and conditions mentioned and set forth in the indenture hereinafter mentioned; and thereupon heretofore, and before the making of the said promissory note, to wit, on the 25th *November*, 1831, by a certain indenture, bearing date the day and year last aforesaid, (setting forth an indenture between *Edward Chambers*, of the first part; the said *G. C.*, of the second part; the said *L. S. C.*, of the third part, and *J. M.*, since deceased and the plaintiffs, of the fourth part; whereby *Coxe* and *Chambers* mortgaged leasehold hereditaments, &c., and assigned certain policies of insurance to the plaintiffs to secure the said sum of 2600*l.*) That afterwards, to wit, on the 25th *November*, 1832, default was made in payment of said 2600*l.* mentioned in the said indenture, and being the sum for securing which the said note was given; and thereupon the plaintiffs, according to their interests and rights respectively, in that behalf, afterwards, and after the death of *J. M.*, and before the commencement of this suit, to wit, on the 1st *June*, 1836, under and by virtue of the said indenture, and of the powers thereby given, sold and disposed of the said leasehold hereditaments, &c., and the several policies of insurance, and other the premises men-

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tioned in the said indenture, and being such securities as aforesaid, and which they were so authorized to sell respectively, at and for divers monies, to wit, to the amount of 2000*l.*, and that after deducting and retaining to and for themselves, the plaintiffs, respectively, all such several costs, &c., as were in the first place to be deducted and retained by virtue of the said indenture, there then remained and was in the hands of the plaintiffs, and they then held and retained to their own use and benefit, as the balance of 2000*l.*, being the proceeds of the said several securities, a large sum, to wit, 932*l.* 11*s.* 3*d.*, for and on account and in satisfaction and discharge of said 932*l.* 11*s.* 3*d* parcel, &c., and the cause of action in respect thereof; and such last-mentioned sum thereby then became and was satisfied and discharged, and the plaintiffs, from thenceforth, hitherto have held the said note without value or consideration as to the said last-mentioned sum.

Fifthly, to the second count, *non-assumpsit.*

Replication, to the first plea, traversing the fraud, &c.

To the second, *de injuriâ.*

To the third, that *Coxe* and *Chambers* did not pay or satisfy, nor did the plaintiffs accept or receive the said monies, in that plea mentioned, in satisfaction or discharge of the cause of action in the first count mentioned.

To the fourth, that the plaintiffs did not sell or dispose of the hereditaments, policies and premises in the said indenture mentioned, or any part thereof, nor was there in the hands of the plaintiffs, nor have they held or retained to their own use and profit, the said sum of 932*l.* 11*s.* 3*d.*, or any part thereof, for or on account or in satisfaction or discharge of the said sum or any part thereof, in the introductory part of the fourth plea mentioned, and the cause of action in respect thereof.

The plaintiffs are bankers, in *London*, and the defendant is a general merchant, residing in the same place. For a considerable period previously to 1825, Messrs. *L. S. Coxe*, and *G. Chambers*, who carried on business in *London* as wine merchants, kept a banking account with the predecessors of the plaintiffs, in their banking firm, which banking account was continued with the plaintiffs until the bankruptcy of *Coxe* and *Chambers*, as hereafter mentioned.

Mr. *Coxe*, one of the partners in the house of *Coxe* and *Chambers*, also kept a private and separate banking account with plaintiffs, for himself individually, which account was closed on the 24th *February*, 1830.

In 1825, *John Martin*, since deceased, and the plaintiffs, *Geo. Stone*, and *H. Stone*, who then composed the banking firm, lent to Mr. *Coxe*, on his private account, the sum of 800*l.*, as a specific loan on the security of an assignment of a policy on his own life, effected in the *Equitable Assurance Company*, for 1500*l.*

In the beginning of the year 1830, the plaintiffs' firm allowed Mr. *Coxe* to receive the sum of 714*l.* from the *Equitable Assurance Office* (being the consideration for the sale of certain additions or accumulations upon the before mentioned policy, which would have become payable at the death of Mr. *Coxe*), upon the understanding that he was thereout to pay to them the sum of 300*l.*, in part discharge of the said debt of 800*l.*, which he accordingly did, and which reduced his debt to 500*l.*

Between *April*, 1825, and *November*, 1831, the plaintiffs, *J. Martin* (then *J. M.*, the *younger*), *G. Stone*, the younger, and *James Martin*, had been

partners in the bank; and on the 24th of *June*, 1830, the plaintiffs' firm lent to Mr. *Coxe* a further sum of 100*l.*, making, with the former balance of 500*l.*, 600*l.* on his own private account. The interest upon this loan was paid at or about *Christmas* in every year, and was paid up to *Christmas*, 1830.

When Mr. *Coxe* closed his private banking account with the plaintiffs' firm, the above specific loan of 500*l.* remained due, and the further sum of 100*l.* was subsequently advanced as before-mentioned.

In *November*, 1831, Messrs. *Coxe* and *Chambers* having occasion for a loan on their partnership account, entered into a negociation with the plaintiffs' firm, in order to obtain it. Pending this negociation, and before any definite agreement between *Coxe* and *Chambers* and the plaintiffs' firm was come to, viz., on the 11th of *November*, 1831, the plaintiffs' firm advanced to Messrs. *Coxe* and *Chambers* 300*l.* as a specific loan, which loan was, on that day, carried to the credit of *Coxe* and *Chambers*, in their general banking account.

On the 16th of the same *November*, it was agreed between the plaintiffs and *Coxe* and *Chambers*, through the medium of *Coxe* (but without the knowledge or privity of the defendant, who had not then been applied to, to become surety) that the plaintiffs' firm should make a loan to *Coxe* and *Chambers*, of the sum of 2600*l.*, and that the plaintiffs' firm should thereout deduct, or be re-paid, the 690*l.* due from Mr. *Coxe* on his private account, and secured as before-mentioned, and the interest thereon, amounting together to 627*l.* 10*s.* 8*d.*, and also the 300*l.* and interest advanced to *Coxe* and *Chambers* on the 11th of the same *November*, and that thereupon the policy of insurance for 1500*l.*, which had been given as security for 800*l.*, should be transferred or stand as a security for the said sum of 2600*l.*, and which was to be further secured by an assignment to the plaintiffs' firm of certain leasehold premises, the property of Mr. *Edward Chambers*, the father of *George Chambers*, and of a certain policy effected in the *Equitable Assurance Company* for 500*l.*, on the life of *George Chambers*, and also by a joint and several promissory note of some other persons, who were to be afterwards named by *Coxe* and *Chambers*, and to be approved of by the plaintiffs; and subsequently, but before the 25th of same *November*, the defendant and *Edward Chambers* were accordingly proposed as sureties, and were approved of by the plaintiffs.

In pursuance of this agreement, an indenture, by way of mortgage, bearing date the 25th day of *November*, 1831, was made between *Edward Chambers*, therein described, of the first part; the said *George Chambers*, of the second part; the said *L. S. Coxe*, of the third part, and the plaintiffs' firm, of the fourth part; and was executed by *Ed. Chambers*, *Geo. Chambers* and *L. S. Coxe*; the deed reciting, amongst other things, that the entire interest in the 1500*l.* policy was available for the purposes of that security, the 800*l.*, formerly borrowed on it by *Coxe*, having been re-paid to the plaintiffs; but not disclosing the arrangement made, as to the application of the 2600*l.*, or the deduction that was to be made from it in respect of previous debts. The deed was executed by the parties who signed it, on the day it bore date, at the office of Messrs. *Swain*, *Stevens*, & Co., the solicitors for the plaintiffs' firm, and *was read over in the presence of defendant and Messrs.* Coxe *and* Chambers. At the same time, the note, upon which this action is brought, was made and signed by the defendant and *Ed. Chambers*. The following is a copy of the note:—

" *London*, 25th *Nov.* 1831.

" 2600*l.*

" On the 22d day of *November*, 1832, we jointly and severally promise to pay to Messrs. *Martin* and *Stone*, or order, two thousand six hundred pounds, with interest, and to pay the interest half yearly, for value received.

" *E. Chambers.*

" *Charles Spencer Compton*, jun."

On the back of the note the following memorandum was written at the time it was made and before it was executed, and read over to the defendant :—

" The within sum of 2600*l.* is the same sum of money as is mentioned in an indenture dated the 25th *November*, 1831, and made between *E. Chambers*, of the first part; *Geo. Chambers*, of the second part; *L. S. Coxe*, of the third part; and Messrs. *Martin* and *Stone*, of the fourth part."

The defendant was surety on the note for Messrs. *Coxe* and *Chambers*. He became so at their request, made through *Geo. Chambers*, who communicated to him that the plaintiffs were to lend to the firm of *Coxe* and *Chambers* 2600*l.*, but *did not then or at any other time, until long after the securities were executed, communicate the arrangement and agreement between the plaintiffs and* Coxe *and* Chambers, *or that there was any arrangement amongst the parties, further than that the plaintiffs were simply to lend the sum of* 2600*l. to* Coxe *and* Chambers.

Before the defendant signed the promissory note, the subject of this action, *the recitals of the deed were read over to him; but the plaintiffs did not, nor did their solicitor, nor did* Coxe *and* Chambers *inform the defendant before he signed such note, that any agreement existed, respecting the application of the said sum of* 2600*l.*, *or of the deduction to be made thereout*, as above-mentioned, *or that* Coxe *and* Chambers, *or either of them, were indebted to plaintiffs, or that there had been any* bonus *received on the policy*, as before-mentioned; *but the defendant did not then, or at any other time, make any enquiries* of the plaintiffs, or of their solicitor, or of the said *Coxe* and *Chambers, as to the state of the accounts between the plaintiffs and* Coxe *and* Chambers, or either of them, *or as to the intended application of the loan, or as to any* bonus *having been received upon the policy.*

Coxe and *Chambers* had, on the said 25th day of *November*, a small sum to their credit in their banking account with the plaintiffs, and they did not overdraw that sum until the 29th *November*, when they drew various checks, amounting together to a considerable sum more than the balance of their banking account; and on the same 29th *November*, the plaintiffs' firm credited *Coxe* and *Chambers* in their general banking account, and in their pass book, as follows: " Cr., 29th *November*, cash lent, 2600*l.*—Dr., 1831, *November* 29th, by sundry loans and interest 928*l.* 12*s.* Five days' interest allowed on 2600*l.*; 1*l.* 8*s.* 6*d.*"

This sum of 928*l.* 12*s.* was the amount of the different loans above-mentioned, and the interest due thereon; and the accounts were afterwards continued between the said parties in the same pass book and general account.

In *January*, 1832, *John Martin* died.

Coxe and *Chambers* paid the plaintiffs' firm the interest on the 2600*l.*, annually, from the time of the advance, till *Christmas*, 1834; the account of

such interest having been from time to time charged and allowed in the accounts between *Coxe* and *Chambers* and the plaintiffs, and stated in the usual pass book.

In *July*, 1835, *Coxe* and *Chambers* stopped payment, and soon afterwards became bankrupts.

On or about the 28th day of *July*, in that year, the plaintiffs notified such stoppage to the defendant, and reminded him of his liability on his note. After the bankruptcy of *Coxe* and *Chambers*, their assignees sold the two before-mentioned policies by public auction, which produced, together, the sum of 871*l.*, which the plaintiffs received; and they subsequently sold the leasehold premises which had been mortgaged to them by private contract, for the sum of 270*l.*; and they also received a dividend, under the bankruptcy of *Coxe* and *Chambers*, on the said debt of 2600*l.*, of 364*l.* 7*s.* They gave the defendant notice of such intended sale, and also of the sums which were realized. The sum still due to the plaintiffs on the note, amounts to 1300*l.* 10*s.* 7*d.* with interest, to recover which this action was brought.

The Court are to be at liberty to draw any inference which a jury might have drawn. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover any, and what sum? and the verdict is to be entered on the separate issues for the plaintiffs or defendant accordingly, or a nonsuit may be entered, as the Court shall direct.

The case was argued during this term.

Sir *W. W. Follett*, Q. C., for the defendant, proposed to begin, as the issue was upon him.—[*Tindal*, C. J.—The rule is, that on a special case, where the verdict is entered for the plaintiff, he is entitled to begin.]

Wilde, Serjt., for the plaintiffs.—The plaintiffs are entitled to the whole amount that remains due upon the note. It is not competent to a party giving a note to raise the same objections as are open to a party giving a guarantee in a precise form. But even if it were otherwise, there has been no fraud here upon the defendant; it was never intended that he should be made cognizant of the deed; the whole of the 2600*l.* was brought to the credit of *Coxe* and *Chambers*, and therefore they had the full benefit of it. The frame of the note left the whole arrangement to the parties themselves, unrestricted by any special terms. He cited and distinguished *Glyn* v. *Hertel* (*a*), and *Laxton* v. *Peat* (*b*), overruled in *Fentum* v. *Pocock* (*c*).

Sir *W. W. Follett*, *contrà*.—The defendant entered into the contract upon the understanding that *Coxe* and *Chambers* were to have the real benefit of the whole of the 2600*l.*, whereas, by a secret agreement between them and the plaintiffs, they only had the difference between that sum and the amount of *Coxe's* private debt of 600*l.*; for *Coxe* and *Chambers* could not have drawn for the whole 2600*l.*, but only for the amount of the difference. This secret agreement, therefore, was a *fraud, in law*, upon the surety; in order to constitute which, it is not necessary that there should be any moral or actual fraud. Any agreement between a principal and the party to be guaranteed,

(*a*) 2 Moo. 134; 8 Taunt. 208.
(*b*) 2 Camp. 185.
(*c*) 5 Taunt. 192; 1 Marsh. 14.

which varies, or which may have the effect of varying, the situation of the surety, operates as a discharge to him, *Jackson* v. *Duchaire* (*d*), *Pidcock* v. *Bishop* (*e*); and the concealment of the agreement is still a fraud, though it may never work an actual injury, *Mayhew* v. *Crickets* (*f*). Every material circumstance ought to be stated, as in the case of a policy of insurance.

Wilde, in reply.—The principles laid down on the other side are stated too extensively, and do not apply to this case. In the case of a policy, the jury would judge of the materiality of any fact withheld. The suretyship here embodies no terms: no representation was necessary to be made to the defendant; none was called for; none was, in fact, made; for the deed cannot be taken as a representation. The defendant had agreed to become a surety before he heard of that deed. The effect of the argument, on the other side, would be to write into the note a great number of special circumstances, which are not, in fact, mentioned in it. The law will deal with a suretyship according to its legal incidents. He cited *The Bank of Ireland* v. *Beresford* (*g*), *Price* v. *Edmunds* (*h*), *Nicholl* v. *Norris* (*i*), *Free* v. *Hawkins* (*j*).

Cur. adv. vult.

TINDAL, C. J., now delivered judgment.—The main question in this case, and which arises upon the first plea to the count upon the promissory note, is this, whether the promissory note was obtained from the defendant under circumstances which are deemed, *in law*, to amount to covin (for there is no suggestion, whatever, of any intentional fraud or misrepresentation on the part of the plaintiffs, personally), so as thereby to avoid the validity of the security in the hands of the plaintiffs.

The promissory note having been given by the defendant as a security for the debt of *Coxe* and *Chambers*, and the note still remaining in the hands of the plaintiffs, the original payees, the consideration upon which it was given to them, and the several circumstances under which the defendant was induced to enter into it, are the subject of inquiry and investigation in the present action. And with respect to the nature of such inquiry, and its bearing and effect on the validity of the instrument, *we cannot see any sound legal distinction arising from the form of the security itself; that is, whether such security is taken in the form of a promissory note, or as an ordinary guaranty for the payment of a debt of a third person. For the liability of the maker of the note, and of the guarantor, depends precisely on the same event, namely, the default of the principal debtor to make good his payment; and the extent of the surety's liability is precisely the same on either instrument;* so that there seems no reason, and no authority has been cited to the effect, that the validity of the two instruments should not stand upon precisely the same footing, so far as depends on the circumstances under which the same were given.

Now the principle to be drawn from the cases to which reference has been made in the course of argument we take to be this; that *if, with the know-*

(*d*) 3 T. R. 551.
(*e*) 3 B. & C. 605; 5 D. & R. 505.
(*f*) 2 Swanst. 185; See S. C. 1 Wils. C. C. 418; 2 Bing. 185.
(*g*) 6 Dow. 238.
(*h*) 10 B. & C. 578; 5 M. & R. 287.
(*i*) 3 B. & Ad. 41.
(*j*) 8 Taunt. 92; 1 Moo. 535.

ledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, (the misrepresentation being such, that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability may be thereby increased), the security so given is void at law, on the ground of fraud.

The question, therefore, becomes this, whether, upon the facts stated in the special case, there appears to have been any such misrepresentation on the part of the plaintiffs.

It is perfectly true, as urged by the counsel for the plaintiffs, that the agreement between the plaintiffs and *Coxe* and *Chambers*, under which the former were to be allowed to deduct, out of the advance of 2600*l.*, the old debt of 800*l.* due from *Coxe* on his separate account, was entered into before any application had been made to the defendant to become surety; and also that *Coxe* and *Chambers* never communicated to the defendant, until long after the transaction, that any such arrangement had been made, or, indeed, any other, than that the plaintiffs were simply to lend them 2600*l.*; and if the matter had rested here, no objection, either on the ground of suppression, or misrepresentation, could have been urged against the validity of the note. The plaintiffs are not to be made responsible for the communication, or want of communication, between their debtor and the surety, unless they are shewn to be agreeing to it; and for any thing which appears, as to this part of the transaction, they were ignorant that a correct statement had not been made to the defendant. But it appears from the special case, that at the time of signing the note, the principal debtors, *Coxe* and *Chambers*, and the defendant, were at the office of the plaintiffs' attorney, where the deed of the 25th of *November* was read over in their presence, the case stating expressly "that before the defendant signed the promissory note, the recitals of the deed were read over to him;" and that upon the same occasion, and before the note was signed by the defendant, the memorandum was indorsed upon the note, stating that the sum mentioned in it was the same as that mentioned in the deed. Now we think the construction, and the only construction, which can be put upon the recitals in the deed is, that the former debt of 800*l.*, due to the plaintiffs from *Coxe*, on his separate account, and the re-payment of which was secured by *Coxe's* policy for 1500*l.*, *had been at that time paid by* Coxe *to the plaintiffs;* and that the sum agreed to be advanced by the plaintiffs to *Coxe* and *Chambers*, upon a new loan, was *the full and entire sum of* 2600*l.* We cannot consider these recitals in any other light than as a direct representation made to the defendant before the note was signed, not, indeed, personally by themselves, but by the agents of the plaintiffs' employed in carrying the negociation for the loan into effect; and, consequently, by whose acts the plaintiffs are bound; and that this representation was untrue in a material respect, namely, that the private debt of *Coxe* had not been paid at the time of the execution of the deed, and that the entire sum of 2600*l.*, was, by the private stipulation between the parties, not to be advanced to, or placed to the credit of, *Coxe* and *Chambers*, but only the sum of 2600*l.* minus the amount of the debt due from *Coxe* to the plaintiffs.

And we think ourselves bound, upon every legal principle of reasoning, to assume, that as the defendant was present when the recitals of the deed were read over to him, he must have signed the note with a full knowledge and

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understanding of the facts therein stated, and in the faith and confidence that the statement was true. The recitals were read over to him for the purpose of making him acquainted with the state of the account between *Coxe* and *Chambers* and the plaintiffs, and with the collateral securities given by *Coxe* and *Chambers*, which he, the surety, might, if it became necessary, call to his aid and indemnity; and his attention must have been called to the recitals in the deed by the circumstance of the memorandum indorsed on the note, which could be placed there for no other purpose than to connect the note with the transaction stated in the deed.

Then, as it appears to us that the representation, as to the re-payment of the debt due from *Coxe* and the amount of the new loan to *Coxe* and *Chambers*, was untrue, and that such misrepresentation related to a fact material to the surety's interest, we think the promissory note is thereby void, and such being our opinion on this point, it becomes unnecessary to discuss the second objection which has been urged, as to the misrepresentation in the recitals of the deed of the then existing state and value of *Coxe's* policy; on which point, however, if it had been necessary, we should have been ready to declare our opinion.

We think, therefore, a nonsuit should be entered.

Judgment of nonsuit.

FRANKS and others *v.* PRICE and others.

Devise of lands to *J. L.* for life; remainder to *M. H.* and *N. H.*, for their respective lives, share and share alike and if either should die without leaving issue male, the whole to the survivor for life; and if *M. H.* should (after the death of *J. L.*) die before *N. H.*, leaving issue male, then one moiety to the sons of *M. H.* in tail male: and in default of such issue, to *N. H.* for life; remainder to his sons in tail male; and in default of such issue, to the testator's right heirs; and if *N. H.* should (after the death of *J. L.*) die before *M. H.*, leaving issue male, then one moiety to the sons of *N. H.* in tail male; and in default of such issue to *M. H.* for life, remainder to his sons in tail male; and in default of such issue, to the testator's right heirs; and in case *M. H.* and *N. H.* should both die *without leaving issue male*, then to such person as, at the death of the survivor, should be testator's right heir:—

Held, that upon death of *M. H.* without issue, *N. H.* took an estate tail in remainder in the whole, expectant on the determination of the estate limited to *J. L.*

BY order of the Master of the *Rolls*, the following case was stated for the opinion of this Court.

Moses Hart, being seised in fee of certain messuages, lands, and hereditaments, at *Topsfield*, in the county of *Essex*, by his will, dated the 20th of *April*, 1756, and duly executed and attested, gave, devised and bequeathed his said messuages, lands and hereditaments, at *Topsfield*, to trustees and their heirs, in trust, as to one moiety of the premises for his daughter *Judith Levy* for life, and as to the other moiety of the premises, for his daughter *Rachael Adolphus* for life, with divers remainders and cross-remainders to the issue of *Rachael Adolphus*; and in default of such issue, to testator's three sisters for their life and the life of the survivor; and from and after the decease of his daughters, and the issue of his daughter *R. A.*, and the decease of his three sisters, to the use of *Moses Hart* and *Napthali Hart*, the sons of his brother in law, *Solomon Hart*, for and during the term of their respective natural lives, share and share alike; and in case either of them, the said *M. Hart and N. Hart*, should depart this life *without leaving issue male of his body lawfully begotten*, then as to *the whole of his said estate to the use of the survivor of them during the term of his natural life: and if* M. Hart *should* (after the deaths of *Judith Levy and Rachael Adolphus* and of

the children of the said *R. Adolphus*, if any, and the decease of testator's three sisters), *depart this life before* N. Hart, leaving issue male of his body, then and in such case, the testator devised one moiety of his estate to the use of the first and every other son and sons of *M. Hart*, severally and successively in tail male, and in default of such issue, to the use of *N. Hart* for the term of his natural life; and after his decease, to the use of the first and other sons of *N. Hart* severally and successively in tail male; and in default of such issue, to the use of the testator's right heirs: And if *N. Hart* should (after the death of *J. Levy* and *R. Adolphus*, and the children of the said *R. Adolphus*, if any, and the decease of the testator's three sisters), depart this life before *M. Hart*, leaving issue male of his body lawfully begotten, then and in such case the testator devised one moiety of his said estate to the use of the first and every other son and sons of *N. Hart*, severally and successively in tail male; and *in default of such issue*, to the use of *M. Hart* for the term of his natural life; and after his decease, to the use of his first and other sons severally and successively in tail male; and *in default of such issue*, to the use of testator's right heirs: and in case *M. Hart* and *N. Hart* should both die *without leaving any issue male*, then, and in such case, the testator devised his said estate to the use of such person or persons as should, at the death of the survivor of them, the said *M. Hart* and *N. Hart* be his, the testator's right heir or heirs.

The testator, *Moses Hart*, died without having revoked or altered his will.

The heirs at law of the testator, living at the time of his death, were his said two daughters, *J. Levy* and *R. Adolphus*, his grandson *Henry Isaac Franks*, and his two grand-daughters *Philah Franks* and *Priscilla Franks*; *H. I. Franks* being the only son of *Frances Franks*, a deceased daughter of the testator, who married *Isaac Franks*; and *Philah Franks* and *Priscilla Franks*, being the only children of *Philah Franks*, the wife of *Aaron Franks*, another daughter of the testator, who also died in his lifetime. On the death of the testator, *M. Hart*, *Judith Levy*, and *Rachael Adolphus*, by virtue of the will, entered into possession of the said messuages, &c., at *Topsfield*, and received the rents thereof in equal moieties, until the death of the said *R. Adolphus* in the year 1773, without issue, whereupon *Judith Levy* took possession of *R. Adolphus's* said moiety of the estate, and received the rents of the whole estate from that time to the time of her death.

The devisee, *M. Hart*, and the testator's said three sisters, survived the testator, and all died in the lifetime of *J. Levy*: and the devisee, *M. Hart*, died without having had any issue.

J. Levy died in *January*, 1803; and thereupon *N. Hart* entered into possession of the estate; and in *Hilary Term*, 1821, suffered a common recovery thereof to the use of *Stratford Price*, his heirs and assigns; and the estate was held and the rents thereof were taken accordingly, until about the month of *March*, 1830, when a receiver was appointed of the same by the Court of *Chancery*, who is now in the possession of the estate.

H. I. Franks died in the lifetime of *N. Hart*, without having been married, leaving *Jacob Henry Franks*, the only son of *Philah Franks* the wife of *A. Franks*, his heir at law. *Philah Franks*, sister to *Priscilla Franks*, married *Moses Franks*, and also died in the lifetime of *N. Hart*, leaving Dame *Isabella Bell Cooper*, the widow of Sir *William Henry Cooper*, Bart., her only child and heir at law.

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On the 28th of *December*, 1828, *N. Hart* died without having had any issue; and the heirs at law of the testator, living at the time of the death of *N. Hart*, were the said *Jacob Henry Franks*, *Priscilla Franks*, and Dame *Isabella Bell Cooper*.

The questions for the opinion of the Court were—

First, Whether *N. Hart* took any, and what estate in the messuages, lands and hereditaments at *Topsfield*, under the testator's will.

Secondly, Whether *Jacob Henry Franks*, *Priscilla Franks*, and Dame *Isabella Bell Cooper*, the heirs at law of the testator, living at the time of the death of *N. Hart*, took any, and what estate, in the messuages, &c., at *Topsfield*, under the said will.

Thirdly, Whether *J. Levy*, *R. Adolphus*, *I. Franks*, *Philah Franks*, and *Priscilla Franks*, the heirs at law of the testator, living at the time of his death, took any, and what estate in the said messuages, &c., at *Topsfield* (*a*).

The case was argued in last *Trinity Term*, by *Stephen*, Serjt. (with whom was *Talfourd*, Serjt.) for the plaintiffs.

The question in the case is, whether *Napthali Hart* took under the testator's will an estate tail, or only an estate for life, and whether in the whole, or only in the moiety of the property devised.

The plaintiffs contend, first, that he took an estate in the moiety of the property only, and secondly, that the estate he took, whether in the whole or in a moiety, was only for life—and consequently that the plaintiffs took the fee as heirs at law.

First, *Napthali* took an estate in the moiety only by the express terms of the will; for he was to take the other moiety (of *Moses*;) only in the contingency of the latter surviving other devisees, and dying without issue, before *Napthali*; but as *Moses* died during the life of *Judith*, one of such devisees (and therefore before his life estate could take effect in possession) —as to *his* moiety, *Napthali* could take nothing. The devise of the share of *Moses* to *Napthali*, contains plain and unambiguous words of *contingency*; and the Court must give effect to the devise as it stands. It is laid down in 2 *Powell on Devises* (*b*), that although "the Courts will not construe a remainder to be contingent merely from the inaccurate and inartificial use of expressions importing contingency, if the substance and effect of the limitations afford ground for concluding that they were not used with a view to suspend the vesting. Yet this may be considered, however, as an exception to the general rule; and agreeably to the maxim *exceptio probat regulam*, confirms, rather than opposes the doctrine, that *devises limited in clear and express terms of contingency do not take effect, unless the events upon which they are made dependent, happen*; * * * and an estate will be construed to be contingent, if clearly so expressed, however absurd and inconvenient such a construction may be, and however inconsistent with what it may be *conjectured* was the testator's actual intention." The cases in support of this rule, are *Denn*, dem. *Ratcliffe* v. *Bagshaw* (*c*), and *Holmes* v. *Cradock* (*d*). In *Driver*, dem. *Frank* v. *Frank* (*e*), this principle was fully discussed and recognized, although it was held not to apply to the circum-

(*a*) It was intimated by counsel at the commencement of the argument, that it was not necessary to consider the second and third questions, as the case would turn upon the first.

(*b*) Pa. 224, 3d. edit.

(*c*) 6 T. R. 512.

(*d*) 3 Ves. 317; see also *Wingrave* v. *Palgrave*, 1 P. W. 401.

(*e*) 3 M. & S. 25, affirmed on error, in Cam. Scac., 8 Taunt. 468; 6 Price, 41.

stances of that case. *Dain* v. *Norton* (*f*), is another authority to shew that the failure of *Moses's* moiety affects *Napthali's* title, for it establishes the doctrine that where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, the limitations consecutive on that estate are contingent on the same event, for want of something in the will to authorize a distinction between them (*g*).

Secondly, Assuming that the devise of *Moses's* moiety to *Napthali* was not contingent, still both the brothers took only estates for life, with cross remainders over to their first and other sons in tail male as purchasers, with an ultimate remainder over to the testator's right heirs. The testator has provided for certain cases in which there is an express limitation (or restriction) to *Napthali* for life: the present is an instance of such limitation imperfectly expressed. There are several contingencies omitted in the will, but which must necessarily be intended; in the first part of the will the case of the survivor of *Moses* and *Napthali* leaving issue is not provided for; it is proposed therefore, after the devise to such survivor for life, to interpolate the following words "remainder to the use of the first and other son or sons of such survivor in tail male:" this would be consistent with the rest of the will. It is admitted that under other circumstances the words "in default of such issue" would pass an estate-tail to the father; but it would only be by implication, and the Court have a right to look to the contents of the whole will. The words "issue male," in the first part of the will, just alluded to, are used as words of purchase, and mean sons, or "children;" it may be admitted that in other parts of the will (*e. g.* where the testator devises a moiety of his estate to the first and every other son of each of the brothers respectively, and "in default of such issue" to the use of the survivor for *life*), the testator there uses the word "issue" as a word of limitation, for it there refers to the "issue" of the "sons" and not to the "issue" of the parent; and undoubtedly, the same word *may be* used in two different senses in the same instrument. The rule that words importing a general failure of issue will give an estate-tail to the party whose failure of issue is contemplated, will be relied on by the other side, and it is not disputed: but it has no application to this case, for in the first place, the words "in default of such issue" (in the second branch of the will), do not refer to issue *indefinitely*, but to issue *living at the death of Napthali;* and secondly, those words refer to the antecedent objects, and mean "in default of such issue *as aforesaid*," i. e. *sons*.

That other remainders may be implied, besides those actually expressed, is shown by *Harman* v. *Dickenson* (*h*), cited and approved of in *Exp. Rogers* (*i*), *Burnaby* v. *Griffin* (*j*), *Chapman* v. *Brown* (*k*), where Lord *Mansfield* said, "A court of justice may construe a will; and from what is expressed, necessarily imply an intent not particularly specified in words (*l*). The Court also will take into consideration that the construction contended for on the other side would enable the parties to bar the issue; in *Lethieullier* v.

(*f*) 2 P. Williams. 390.
(*g*) See also *Doe*, d. *Watson* v. *Shipphard*, Doug. 75; *Moody* v. *Walters*, 16 Ves. 283.
(*h*) 1 Bro. C C. 91.
(*i*) 2 Mad. 449. As to this case, see 2 Pow. Dev. 200, 213, n.
(*j*) 3 Ves. 266.
(*k*) 3 Burr. 1626.
(*l*) Pa. 1634.

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Tracy (*m*), Lord *Hardwicke*, in giving judgment, said—"Besides, in this case the son of Mrs. *Tracy*, when twenty-one, may bar all the limitations; and though it is insisted on, and very truly, the power of suffering a common recovery is a consequential one; and courts of justice, as was done in the case of *Shaw* v. *Weigh* (*n*), will construe according to the line of succession without being influenced by the effect it may produce; yet there have been cases, where it is a measuring cast, in which the consideration of barring *his* (issue), had weight (*o*)." *Doe*, dem. *Bean* v. *Halley* (*p*), is also in point.

Then the plaintiffs took as purchasers, under the devise over to the testator's heirs on failure of the issue of *Moses* and *Napthali*; *Doe*, dem. *King* v. *Frost* (*q*); *Doe*, dem. *Barnfield* v. *Wetton* (*r*); *Pells* v. *Brown* (*s*).

The following rules laid down in 2 *Powell on Devises* (*t*), are applicable;—"1st, That the words, *in default of issue*, or words of a similar import, following a devise to *children in tail*, or *in fee*, mean *in default of children*" (citing *Goodright* v. *Downham* (*u*), and referring also to *Ginger*, d. *White* v. *White* (*v*).) "This is free from all doubt. 2dly, That these words following a devise to *all* the sons successively in tail general, are also to be construed as importing such *issue*, even in the case of an executory trust," (citing *Blackborn* v. *Edgley* (*w*), *Morse* v. *Marquis of Ormonde* (*x*).) "3dly, That words devising the property over on failure of issue *male*, following a devise to the whole line of sons successively in tail male, are also referential to such objects," (citing *Bamfield* v. *Popham* (*y*).) *Doe*, dem. *Barnard* v. *Reason* (*z*), is also in point.

Wilde, Serjt. (with whom was *Berry*) for the defendants.

Napthali Hart took an estate tail in the entirety of the property. There is a limitation to him for life, remainder to his issue in tail, with a devise over, in failure of such issue, to the testator's heirs, and this by law amounts to an estate-tail in *Napthali* by implication. The particular limitations creating estates tail in the issue of *Moses* and *Napthali* deal with a moiety only, but the devise over deals with the entirety. The testator's object was to secure to his nephews estates for life only in the moiety, but to keep the entirety in them or the survivor so long as there was issue. The issue take an estate tail in the specific instances (of the limitation to the said testator's sons), by way of purchase, but by the implication contained in the ultimate limitation, they take by descent. The ultimate limitation creates an estate-tail in the brothers, with cross-remainders; the cases cited on the other side, and referred to in 2 *Pow.* 224, were cases in which there was no express intention of the testator to be carried into effect contrary to the construction contended for; but here the construction contended for would be avowedly against the testator's intention. It has been decided that even where lands are devised to a certain number of sons in tail, and the lands are devised over in case

(*m*) 3 Atk. 774, 784, 793; 1 Hanm. 56.
(*n*) Eq. Ca. Abr. 184.
(*o*) Pa. 797.
(*p*) 8 T. R. 5.
(*q*) 3 B. & A. 546.
(*r*) 2 B. & P. 324.
(*s*) Cro. Jac. 519; Palm. 131.
(*t*) P. 351, 3d edit.
(*u*) Doug. 264.
(*v*) Willes, 348.
(*w*) 1 P. W. 600.
(*x*) 5 Madd. 99.
(*y*) 1 P. Wms. 54, 760; 1 Eq. Ca. Abr. 183; 2 Vern. 427, 449; S. C. Salk. 236. *Sed quære* the authority of this latter report.
(*z*) Cited 3 Wills. 244; see also *Southby* v. *Stonehouse*, 2 Ves. sen. 211; *Smith* v. *Horlock*, 7 Taunt. 129

the parent shall die without issue male, these words are not referential, but create an implied estate-tail in remainder in the parent. *Langley* v. *Baldwin* (*a*); *Attorney-General* v. *Sutton* (*b*); *Allanson* v. *Clithero* (*c*); *Doe*, d. *Bean* v. *Halley* (*d*); *Parr* v. *Swinsdale* (*e*).—[*Tindal*, C. J.—If you rely entirely on the ultimate clause in the will, it appears that no estate for life is given to either brother in the entirety, you must therefore go back to the question as to the moiety; this is a difficulty that strikes the Court, and is merely thrown out for your consideration. In the cases just cited, the parent had an estate for life in the whole property.]—I submit here that under the events that happened, *Napthali* had an estate for life in the whole. Suppose the argument as to *Napthali's* estate being restricted to a moiety is correct, the event in which the estate was to be restricted did not happen (*f*). The will omits in one part to give what it gives in another. It was the testator's object to prevent the brothers from barring each other. It is in cases where there have been words expressly restraining the estate to a tenancy, that the difficulty has arisen. The remainder to the heirs of the testator was a contingent remainder, and was therefore bound by the fine in 1821, *Webb* v. *Hearing* (*g*), *Doe*, d. *Planner* v. *Scudamore* (*h*), *Lord Scarborough* v. *Doe*, d. *Saville* (*i*). If the construction contended for on behalf of the defendant is adopted, there is no object of the testator that will fail: there is no difficulty, if the intention of the testator is to be taken as the rule of construction, or if the legal construction is allowed to prevail; the difficulty is raised by the construction contended for on the opposite side. The Court will never interpolate words into a will, except from the necessity of effectuating the testator's intention; they will never do so to defeat such intention. Authorities have been cited on the other side to show that where technical language is used, the Court will give effect to it, unless by so doing they manifestly oppose the testator's intention. These authorities are in favour of the defendant. Another class of cases has been referred to, where the failure of issue was definite; but here it is indefinite: these cases therefore have no application.

Stephen, in reply.—According to the argument on the other side, the devise over of the whole deals with a different estate from the devise of the moiety; but the two moieties together make the whole. The *Attorney-General* v. *Sutton*, and that class of cases, are not in opposition to *Bamfield* v. *Popham*, because in the first mentioned cases the devise did not go further than the second son; the decision in *Bamfield* v. *Popham* remains unshaken. —[*Wilde*.—In 2 *Powell on Devises*, 544, n., it is said, that the doctrine advanced in that case as to the incapacity of an express estate for life, to be enlarged into an estate-tail, is now exploded (*j*).]—The proposed interpolation is not *necessary*, for the ultimate devise over has the same effect.

(*a*) 1 Eq. Cas. Ab. 185, pl. 29; 1 P. Wms. 759, 8 Mod. 258.
(*b*) 1 P. Wms. 754; 3 Bro. P. C. 75, Toml. ed.
(*c*) 1 Ves. sen. 24; Belt's Sup. 24.
(*d*) *Ut supra*.
(*e*) 4 Rus. 283; see also *Stanley* v. *Leonard*, 1 Eden, 87.
(*f*) By the fact of the other tenant in common *(Moses)* having died before the estate, of which he was the tenant in common, vested in possession.
(*g*) Cro. Jac. 415.
(*h*) 2 B. & P. 289.
(*i*) 3 A. & E. 897.
(*j*) See also *ib.* p. 602.

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Where the construction of a will is doubtful, the consideration as to barring the issue will always have great weight.

The following certificate was afterwards sent:—

We are of opinion that upon the death of *Moses Hart*, without issue, *Napthali Hart* became and was *seised* under and by virtue of the testator's will of a *vested estate* in tail male in remainder (expectant on the determination of the estates limited to *Judith Levy*, *Rachael Adolphus*, and her children, and the testator's three sisters), in all the messuages, lands and hereditaments, at *Topsfield*.

It having been intimated to us by the counsel on both sides, that in the event of our opinion on the first question being such as is above stated, they do not desire to have our opinion on the matters referred to in the second and third questions, we forbear to say any thing in answer to them.

N. C. TINDAL. J. VAUGHAN.
J. A. PARK. T. COLTMAN.

END OF MICHAELMAS TERM.

SITTINGS AFTER MICHAELMAS TERM.

Nov. 28, 29, & 30.

DAVIES and Wife, Demandants, LOWNDES, Tenant.

THIS writ of right came on again for trial at bar (*b*), pursuant to the directions of the Court of *Exchequer* Chamber (*c*).

Sir *W. W. Follett*, Q. C., *Talfourd*, Serjt., and *E. V. Williams* for the demandants: the *Attorney General*, *Wilde*, Serjt., *Kelly*, Q. C., and *R. V. Richards* for the tenant.

E. V. Williams opened the pleadings.

1. *T. J. S.*, in 1768, devised certain estates *to his right and lawful heir, for the better finding out of whom* he directed *advertisements to be published immediately* after his decease, in the public papers; and certain legacies were directed to be paid by the heir at law, *within twelve months after testator's decease*; and if no heir at law was found, then he constituted *W. L. his lawful heir, on condition that he took the name of S.*:—*Held*, that the heir was not bound to claim within twelve months, nor within any period short of sixty years.

2. *Held*, that the heirs of the testator's paternal great grandmother were to be preferred to the heirs of his paternal grandmother.

3. *W. L.* having been appointed receiver of the estates, and certain proceedings in equity having been taken by parties claiming as heirs under the above will; in 1783 a decree in *Chancery* was made, terminating the receivership of *W. L.*, and declaring that the premises belonged to him, and that he should be let into possession:—*Held*, in a writ of right brought by a party claiming as heir against the descendants of *W. L.*, that this decree was admissible, not for the purpose of shewing that *W. L.* had any title to the estate, but to shew the termination of his receivership.

4. Upon a general *mise* joined in a writ of right, a fine levied by the tenant's ancestor is admissible in evidence.

5. A family pedigree, stated to have been "collected from parish registers, wills, inscriptions, family records, monuments, and *history*," is not admissible in evidence.

(*a*) Before *Tindal*, C. J., *Vaughan*, *Bosanquet*, and *Coltman*, Js.

(*b*) *Ante*, 217; 4 New Cases, 478; 5 Scott, 835.

The *Attorney General* stated the case for the tenant. He relied upon the same points as upon the former trial (*e*), viz., first, that the claim of the heir, under the testator's will, ought to have been made within twelve months after his decease, or at any rate, within a reasonable time; secondly, that the heirs, by the testator's paternal grandmother, had a better claim than the demandants, who claimed through the paternal great-grandmother; thirdly, that the heir mentioned in the will was meant to be of the blood of the *Selbys;* and fourthly, that the fine levied by Mr. *Lowndes*, the devisee, in 1783, operated as a bar to the heir. The evidence adduced on both sides was nearly the same as on the former occasion, and therefore it will only be necessary to notice, at any length, those facts which were new, or upon which any discussion arose.

It was proved that Courts, for the Manor of *Whaddon*, had been held by Mr. *Lowndes* (who had been appointed receiver, in 1773), under the different names of *William Lowndes*, *William Lowndes Selby*, and *William Selby*, as upon the former trial.

Evidence was then gone into to show the manner in which the property came to *T. J. Selby* (the testator).

A deed to lead to uses, dated 23d *April*, 1784, executed by *Wm. Selby*, late called *Wm. Lowndes*, was put in.

William Christmas, a clerk in the Bank of *England*, proved that, in pursuance of an order of the Court of *Chancery*, of the month of *March*, 1783, a transfer had been made in the bank-books, in the following *May*, of the accounts of the *Selby* estates, from the name of the accountant general of the Court of *Chancery*, to the name of *William Lowndes Selby*.

The decree in *Chancery*, dated 28th *March*, 1783 (*d*), was then tendered in evidence to shew the nature of Mr. *Lowndes's* possession, when the fine was levied.

Talfourd, Serjt., for the demandant, objected to its admissibility, the heir at law being no party to the suit in which the decree was pronounced. The decree purports to confirm the character of Mr. *Lowndes's* possession; but it is not evidence for that purpose; that must be determined by his *acts;* if he had entered and made a tortuous feoffment, that would have been an *act* admissible in evidence; the decree is the mere opinion of the Court, and cannot bind the inheritance.—[*Tindal*, C. J.—I think the decree may be used for this collateral purpose, viz., to shew that, at a certain time, Mr. *Lowndes* ceased to be the receiver of the estate, and to explain the ambiguous entries on the Court rolls.]

Sir *W. W. Follett*.—We are objecting to the decree being admitted to bind the rights of parties; the other side are not tendering the order appointing Mr. *Lowndes* receiver.—[*Tindal*, C. J.—We think the decree is not receivable for the purpose of shewing Mr. *Lowndes* the owner, but that it is receivable to shew the termination of his receivership.]

Talfourd, Serjt., then tendered a bill of exceptions against the reception of the decree, which was put in and read.

(*e*) See 1 Hodg. 125; 1 New Cases, 597; 2 Scott, 71.

(*d*) See 1 Hodg. 127.

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The will of *T. J. Selby* (the testator) was then put in.

William Aussenden, aged 73, parish clerk of *Whaddon*, stated, that he remembered that there were rejoicings, in the spring of 1783, when Mr *Lowndes* came to "*heir*" the estate, and took possession of it; and that there was a may-pole erected, and a procession to meet Mr. *Lowndes*.

James French, aged 76, also remembered the rejoicings, in 1783, about Mr. *Lowndes* "taking possession of something;" but there was nothing to eat and drink on the occasion.

Evidence was then tendered to shew that receipts had been given to Mr. *Lowndes*, for rent, to various tenants on the estate, first in the name of *Lowndes*, and secondly, in the name of *Selby*; but upon its being objected to, it was withdrawn.

The fine levied by *William Lowndes*, the devisee, by the name of *William Selby*, in *Trinity Term*, 1784, was then tendered in evidence.

The counsel for the demandants objected to its admissibility.

First, it is not evidence on the *mise* joined; but it should have been specially pleaded, if intended to be set up in bar of the demandants' claim. The *mise* is joined upon the question, which party has the most mere right to the estate, and not upon the question whether the demandants' right has been barred, which would be the effect of the fine. The point has never been directly decided; and although in *Tyssen* v. *Clark* (*e*), the Court seemed to be of opinion that every thing might be given in evidence under the general *mise*, except collateral warranty, yet they did not give any positive opinion. In *Hardman* v. *Clegg* (*f*), which was a writ of right, a fine was specially pleaded, in which case the issue would be tried by a jury, and not by the grand Assize. The fine does not affect the right of the parties, but merely concludes them, and bars the remedy; 4 *H.* 7, c. 24 (*g*).—[*Tindal*, C. J.—In *Bro. Abr. Droit* 48, it is said that any thing may be given in evidence under the general *mise*, except a collateral warranty (*h*): and that authority had been recognized in modern treatises, as in *Booth on Real Actions*, 98, 112. The terms of the issue are, which party has the greater title to *hold* the premises (*i*).

(*e*) 3 Wils. 419; 2 W. Bl. 891; Loft, 496.

(*f*) Holt, N. R. C. 657.

(*g*) "And the said proclamations so had and made the said fine to be a final end, and conclude as well privies as strangers to the same, except women covert, &c."

(*h*) "Debt.—*Per Laken*, in writ of right, [where] the *mise* is joined, and the tenant gives in evidence a release made in another county, the grand assize ought [so] to find it. For it is said elsewhere, that nothing can be pleaded in this action but a collateral warranty, but all other things shall be given in evidence, (citing 9 E. 4, 40)" The same rule is laid down in *Doc. Plac.* 198; and the reason is given why, upon the *mise* being joined, upon the mere right, the tenant cannot give in evidence a collateral warranty; for he has not any right thereby, and therefore the collateral warranty ought to have been pleaded.

(*i*) The form of the plea was as follows:—"And the said *W. S. Lowndes*, by *T. W.*, his attorney, comes and defends the right of the said *T. Davies* and *Elizabeth* his wife, and the seisin of the said *Thomas James Selby*, when, &c., and the whole, &c., and whatsoever, &c., and chiefly of the tenements aforesaid, with the appurtenances, as of fee and right, &c.; and he puts himself upon the grand assize of our lord the King, and he prays a recognition to be made whether he, the said *W. S. Lowndes*, has a *greater title to hold* the tenements aforesaid, with the appurtenances, to him and his heirs, as he now holds the same, or whether the said *T. Davies* and *Elizabeth* his wife, the now demandants, have *title to hold* the said tenements, with the appurtenances, as they have above demanded the same, &c.: And the said *T. Davies* and *Elizabeth* his wife, do the like; therefore, &c."

—*Bosanquet*, J.—I know that, in practice on the circuit, a fine has been admitted in evidence, under the general *mise*, although objected to.]

Secondly, the fine was levied by the name of *Selby*, to which Mr. *Lowndes* had not acquired any right, either by reputation, or otherwise; and a party is bound to levy a fine in the name by which he is generally known; the theory being, that all the world shall have notice thereof, *Shep. Touch.* 8. In the judgment given by the Court of *Exchequer* Chamber, it was assumed, that Mr. *Lowndes* had assumed the name of *Selby* before the fine was levied; but the evidence, as it stands, does not shew that he had ever done so, except on the single occasion of executing the deed, to lead to uses which was, in fact, part of the fine.

Thirdly, the fine was levied by a stranger to the inheritance, who was in possession, under circumstances which gave him no title to the freehold, either by right or by wrong. If he had entered tortuously, and then levied the fine, the case would have been different; but he was in possession, in character of a trustee, as receiver, claiming no title to the freehold; it is like the case of a tenant for years holding over, and then levying a fine; or a *termor*, for a long lease, proclaiming himself owner and levying a fine: it amounted to a mere wrongful *continuance* in possession, the original *entry* being lawful; *Doe*, dem. *Burrell* v. *Perkins* (*j*); *Doe*, dem. *Parker* v. *Gregory* (*k*); *Williams* v. *Thomas* (*l*); *Shields* v. *Atkins* (*m*).—[*Tindal*, C. J.—We have already disposed of the first objection. As to the last, it goes less to the admissibility of the fine, than to its effect; that, however, will be a matter for future consideration. There is certainly some evidence to go to the grand assize, that Mr. *Lowndes* claimed the freehold. We are not now to determine whether he took the freehold; but there is some evidence to shew that he claimed adversely to the heir. The second objection, as to the name by which the fine was levied, appears to me, to be the only one now open to discussion.]

The counsel for the tenants then urged that this objection also went merely to the *effect* of the fine; as regards the name of the party levying the fine, *constat de personâ, constat de tenementis*; there is no doubt as to either of these points. If a party has three names, the omission of one of them would not vitiate the fine. In the deed, to lead to uses, *Wm. Lowndes* had called himself *Wm. Selby*; if there had been an issue directed to try whether he had ever taken such name, and when, that deed would have been conclusive evidence upon the point.

Talfourd.—If a party had been indicted for larceny, in stealing the goods of *William Selby*, and it were proved that the goods were the property of *William Lowndes Selby*, the indictment would fail, unless he were *generally* known by the former name. See *Rex*. v. *Berriman* (*n*).—[*Tindal*, C. J.—We think that this objection resolves itself into a question of fact, and not of law; and that it will be for the Grand Assize to say whether the execution by Mr. *Lowndes*, of the deed to lead to uses, by the name of *Selby*, was an assumption of that name. It is contended, that this deed is part of the fine itself;

(*j*) 3 M. & S. 271.
(*k*) 2 Ad. & El. 14; 4 N. & M. 308.
(*l*) 12 Ea. 141.
(*m*) 3 Atk. 560; see also 5 Rep. 123; Hard. 401.
(*n*) 5 C. & P. 601.

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but strictly speaking, it is not so. The character of an act may be determined not only *ex antecedentibus*, but also *ex consequentibus*. We think, therefore, the fine should be received in evidence.]

The fine was consequently put in; a bill of exceptions having been tendered upon the part of the demandants as to its admissibility.

A deed was subsequently put in, dated 21st *April*, 1784, executed by Mr. *Lowndes*, by the name of *William Selby*, containing a demise of part of the property to a Mr. *Hanson*, in trust for himself, by the name of *William Selby*, for life.

In order to meet the pedigree set up by the demandants (see opposite page), by which *Elizabeth Davies*, one of the demandants, traced her relationship to the testator, through his maternal great-grandmother, *Mary Selby*, formerly *Lloyd*, said to be the mother of *James Selby*, the testator's grandfather (No. 2,) the tenant adduced evidence to shew that the said *James Selby*, was entered at the *Inner Temple*, in 1647, described as "of *Salford*, in the county of *Bedford*; that there was a family of *Selbys* resident there about that time; that in 1644, *Isabella Selby*, widow, was buried there; and that in *February*, 1646–7, administration of her effects was granted "to her natural (*o*), and lawful son, *James Selby*;" and a deed was produced from the parish clerk at *Salford*, dated 1664, to which a *James Selby* was the attesting witness.

This closed the evidence on the part of the tenant.

Talfourd, then addressed the Grand Assize on the part of the demandants.

In order to meet the last-mentioned evidence, a will was produced (from the proper custody) of one *John Chilton*, dated 10th *May*, 1658, of which the following is an extract:—"I give to my great-niece, *Isabella Selby*, the the orphan child of my late nephew, *Henry Selby*, and grand-daughter of my late sister, *Isabella Selby*, now being with me, the sum of 50*l.* * * * * *; also I give to my nephew, *James Selby*, of *Reading*, in the county of *Berks*, school-master, son of my late sister, *Isabella Selby*, the sum of 20*l.*;" and another will of one *Judith Odell*, "of *Salford*," dated 3d *June*, 1643, whereby she bequeathed certain leasehold property, at *Salford*, to her "dear cousins," *Henry Lloyd*, of *Soldbury*, in the county of *Berks*, clerk, and to *James Selby*, of *Mornington* (*p*), in the county of *Pembroke*, gent. It was also shewn that *Henry Lloyd* died in 1646, (the year before *James Selby* entered the *Temple*, described as of *Salford*.)

The will of *James Lloyd* (No. 6.) was then put in (*q*).

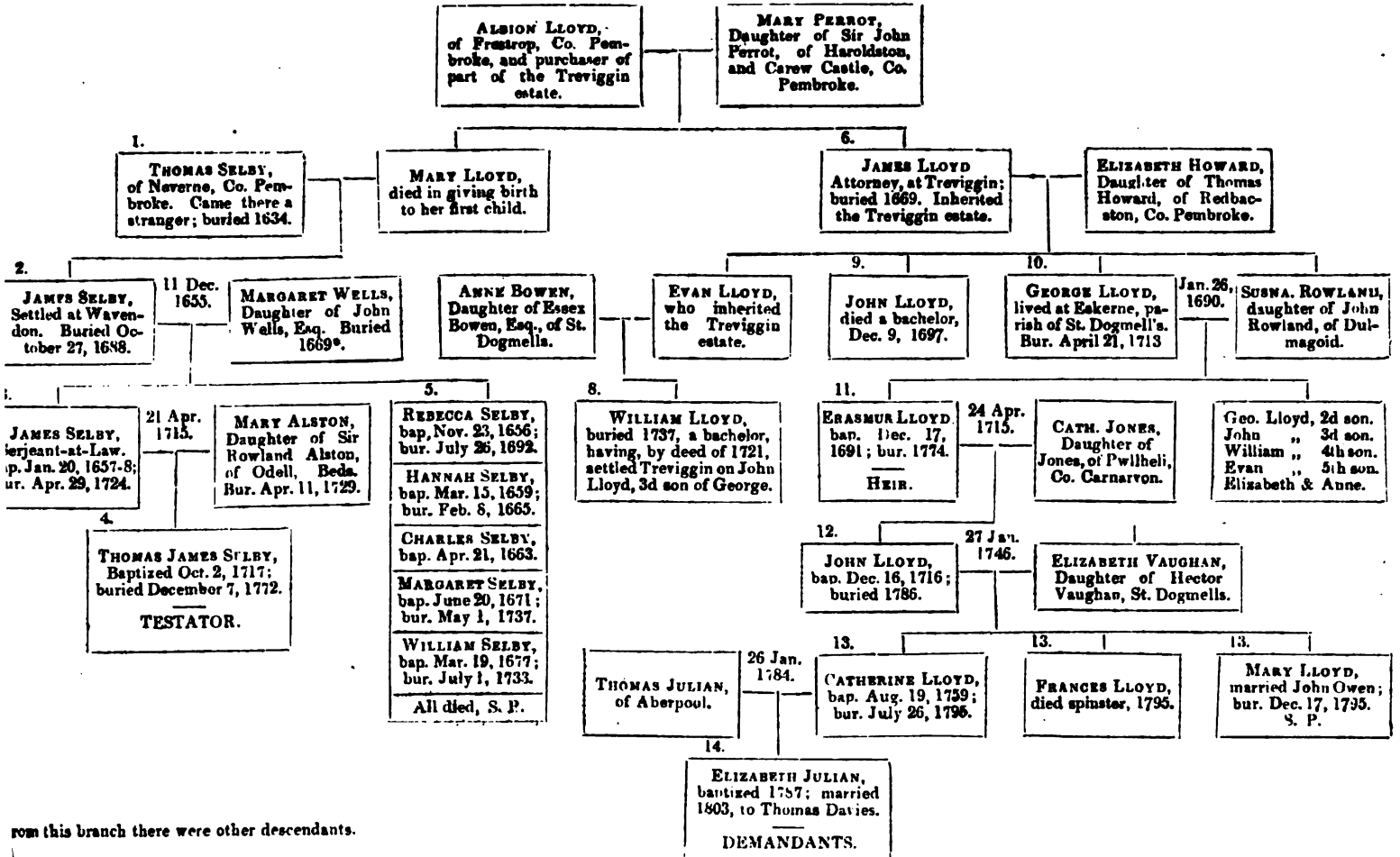
(*o*) *Naturalis*, as opposed to *addictus*, adoptive; a term of the Civil and Canon Law.

(*p*) *Mornington* is near *Neverne*, in *Pembrokeshire*.

(*q*) As this will was the main link to establish the relationship of the *Lloyds* with the *Selbys*, and was subject to much comment, it being contended on behalf of the tenant, both from internal and external evidence, that it was a forgery, it may be as well to state its general tenor. It commenced thus;—

"I give my soul into the hands of *Jesus Christ*, my only Redeemer and Saviour, and my body to the earth, till it shall join my soul;" then immediately followed the bequest "to *James Selby*, of *Wavenden*, in the county of *Buckingham*, the son and only issue of *Thomas Selby*, of *Neverne*, in this countie (*Pembroke*), by my sister *Mary*, his deceased wife, the sum of 40*l.*, of current *English* money." Then followed bequests of 4*d.* to the church of *St. David's*; 2*s.* to the church of *Mornington*; 2*s.* to the poor of the parish church, and a few others of a similar character,

PEDIGREE OF DEMANDANTS.



rom this branch there were other descendants.

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Documentary evidence, to a great extent, was then produced to make out the pedigree; among others

A *Welsh* pedigree, made by *Wm. Lloyd* (No. 8.), was tendered in evidence; at the foot of which there was a memorandum, stating that in was "collected from parish registers, wills, inscriptions, family records, monuments and history."

The counsel for the tenant objected to the admissibility of this evidence, upon the ground that the sources from which it professed to be derived, were apocryphal.

The counsel for the demandants pressed its reception to prove collateral branches of the family.—[*Tindal*, C. J.—If the objection is insisted upon, I cannot say I think the evidence is not admissible. The statement at the bottom of the document shows that it can only be received as secondary evidence. It states that it is collected from *parish registers*, *wills*, &c. We ought to see these *registers* and *wills*: then the reference to "history," alone is sufficient to show that it is inadmissible; for ought that appears, this may be only county history, used and ventilated only in the county to which it relates.]

A bill of exceptions was then tendered upon this ruling of the Court, by the counsel for the demandants.

This closed their case.

The counsel for the tenant then called several witnesses, who were conversant with old writings, for the purpose of shewing that the will of *James Lloyd* was a forgery (*r*).

Talfourd, Serjt., then addressed the Grand Assize upon the evidence offered in reply; and the *Attorney General* replied upon the whole case.

TINDAL, C. J., then summed up the evidence, and left it to the Grand Assize to say, whether the demandants had made out the pedigree.

Upon the points of law, he stated the opinion of the Court as follows:—

First point.—As to the question, whether the heirs, claiming through the testator's grandmother, have a better title than the demandants, who claim

which he desired might be paid immediately; then he devised a messuage and lands, in *Dogmells*, to his son and heir *Evan*, charged with a payment to his two brothers, *John* and *George*, of eight score pounds yearly, being four score pounds to each; to his wife during her widowhood, he devised the moiety of his messuages and lands in *Mornington*, and all his personal estate to his son *Evan*, who was appointed executor to pay debts and legacies. Annexed to the will was an inventory of the testator's chattels, amounting in the whole to only 39*l*. It was strongly contended by the tenant's counsel, that the will was merely a copy; that the greater part of it was a *true* copy of a genuine will, but that the bequest to *James Selby* was an interpolation: they argued thus (*inter alia*) from the precise particularity with which *James Selby* was described; from the fact of his bequest coming before others that partook something of a religious character, and being unconnected with those of a more worldly nature; and from the circumstance that the amount of the testator's personalty was not sufficient to discharge that single legacy. The witnesses, who were afterwards called to speak to the will being a forgery, pointed out various instances in which the abbreviations, &c., were either, in their opinion, incorrect, or were not those of the period of which the will purported to be; and *Bosanquet*, J., in the course of the trial remarked, that the initial '*M*' of the word '*Mary*,' was in a modern and different form from other capital '*Ms*' in the same document.

(*r*) See *Gurney* v. *Langland*, 5 B. & A. 330.

through the great-grandmother, we are of opinion that you must refer to the more remote line (*s*).

Second point.—As to the question whether the heir ought to have enforced his claim within twelve months, or a reasonable time after the death of the testator, we think that he was not limited to the period of twelve months, and that, sixty years being the time allowed by law for a party to bring a writ of right, any time within that period was a reasonable time for the purpose of coming in and making his claim.

Third point.—Upon the question whether the heir, mentioned in the will, should be of the blood of the *Selbys*, this Court has before expressed an opinion; but the point has since been re-considered in a Court of Error, and, reserving the right to form our own unbiassed judgment if we should be again called upon to moot that question, we at present bow to that higher tribunal, and I am bound to direct you that it has been decided that it was not necessary that the demandant should be of the blood of the *Selbys*.

Fourth point.—Supposing the demandants have established the pedigree they set up, then remains the question, whether their claim is bound by the fine levied by Mr. *Lowndes*, in 1784; and this will depend upon two questions of fact. A mere tenant can never levy a valid fine; for his entry, and title to the land, is derived through his landlord; neither can a mere stranger do so, for he has nothing to do with the land; it is absolutely necessary that the cognizor of a fine should have a freehold, either by right, or by wrong. If he has disseized the rightful possessor, he has obtained thereby a wrongful fee, under which his holding is as much adverse to all the world, as if he had possession of the estate by right. Again, a cognizor must levy a fine, either in his own name, or in the name by which he is known to the world. This being the law upon this point, the questions of fact for you to determine will be, first, whether Mr. *Lowndes*, the devisee, at the time he levied the fine, was in possession of the estate, claiming and exercising a right over it as his own; and secondly, whether at that time he was known by the name of *Selby*, by which name he levied the fine; upon this latter point it will not be immaterial to remember that, according to the terms of the will, he was to take the estate upon condition of his assuming the name of *Selby*, and in the absence of any positive evidence upon it, it will be for you to say, whether this would not have furnished him with a strong motive to adopt the name at the time he entered upon the estate.

The Grand Assize returned their verdict as follows:—

First, that the demandants had not made out the pedigree set up by them.

Secondly, that Mr. *Lowndes*, the devisee, was in possession of the estate, claiming the legal title thereto, at the time he levied the fine; and

Thirdly, that he was well known by the name of *Selby* at such time.

(*s*) See *Clere* v. *Brook*, Plowd. 450; 2 Blac. Com. B. 2, ch. 14.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term, 2 Victoria, 1839.

In *Michaelmas* Vacation died Sir *James Allan Park*, one of the judges of this Court. He was succeeded by the Right Hon. *Thomas Erskine*, the Chief Judge of the Court of Bankruptcy, who, upon receiving the coif, gave rings with the motto *Judicium Parium*.

The Judges who sat in *Banc* this Term, were TINDAL, C. J., VAUGHAN, J., BOSANQUET, J., and ERSKINE, J.

JONES *v.* CORRY and others, Executors of WILKINS, Clerk. SAME *v.* SAME, in their own right.

Common Pleas.

Jan. 11.

TWO actions of *assumpsit* were brought by the plaintiff, a mason, against the defendants; one in their character of executors; the other, in their own right. The actions were for work and labour in erecting a castle for the testator, the work having been continued after his death. When the first cause came on for trial at the last Spring Assizes, both the actions, together with all matters in difference between the parties, were referred to a barrister; and it was one of the terms of the reference that the heir of the testator might become a party thereto; and the award was to be made and published before the following *Michaelmas Term*. The arbitrator awarded that a verdict should be entered for the plaintiff, in the first action, for 295*l.*, and that the second action should be discontinued, as there was no ground for it.

Wilde, Serjt., in *Michaelmas Term*, obtained a rule *nisi* to set aside the award on three grounds; first, that the award was not published in due time; secondly, that the arbitrator had exceeded his authority; and thirdly, that he had comprised, in the sum awarded against the defendants, a claim due from the

1. Where an arbitrator, after publishing his award, makes a statement, shewing that he has mistaken his jurisdiction, the Court will receive an affidavit of such statement.

2. Two actions by the same plaintiff against executors, one in their representative character, the other in their individual capacity, were referred to a barrister; he found that the plaintiff had no

ground for the second action, but awarded him damages in the first, including a debt due from the testator's heir, who was a party to the reference. The arbitrator, upon being applied to by the defendant's attorney to state the grounds on which he had so awarded, said he had proceeded on the principle that he was to decide whether any thing was due from the heir. Upon an affidavit of this statement; the Court *held* that he had exceeded his jurisdiction, and set aside the award.

3. Where, by the terms of the reference, an award was to be made and *published* by a particular day; *Semble*, that *execution* of the award, and *notice* to one of the parties, before that day, is a sufficient *publication*.

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testator's heir. His affidavits stated, as to the first point, that no notice of the award was given to the defendants, till the third day of *Michaelmas Term*, when their attorney received a note from the clerk of the plaintiff's counsel that the award had been made in favour of the plaintiff; and as to the second and third points, that it had been admitted at the reference by the plaintiff's counsel, that the second action against the defendants, in their own right, could not be supported, as the work which had been done after the decease of the testator, had been done by the direction, and for the benefit of the heir; that the arbitrator however had included, in the amount awarded, the work done for the heir; and that he stated he thought he had a right to consider both claims. It was further sworn, that after the publication of the award, the clerk to the defendants' attorney applied to the arbitrator, stating that it was the defendants' intention to appeal to the Court against his award, and requesting the arbitrator to inform him in what way he had decided on the construction of the order of reference; and the arbitrator stated, that he had acted on the principle that he was to decide whether any thing was due from the heir-at-law or not.

E. V. Williams now shewed cause.—As to the first point; it appeared that the award was dated and attested the 22d *September*, and he produced an affidavit that the award had been delivered to the plaintiff's agent in *London*, on the 31st *October;* he contended, therefore, that there was a sufficient publication of the award, before the 1st day of *Michaelmas Term* (the 2d *November*); and cited *Mussellbrook* v. *Dunkin* (*a*), *Brown* v. *Vawser* (*b*), *Henfree* v. *Bromley* (*c*).

As to the second point; the objection stated in the rule *nisi*, was insufficient, as it did not show in what respect the arbitrator had exceeded his authority, which it should have done, according to *Reg. Gen.* 2 *G.* 4 (*d*), *Boodle* v. *Davies* (*e*).

As to the third objection; the Court has no materials for judging upon what grounds the arbitrator made his award; the affidavits on the other side merely show, that when he was asked by the clerk of the defendant's attorney why he had made his award as he had done, he stated certain reasons, which it is supposed shew that he had exceeded his authority; but it would be a most dangerous precedent to admit such affidavits for the purpose of invalidating an award. The Court would not receive an affidavit made by an arbitrator, to explain his meaning, *Gordon* v. *Mitchell* (*f*), nor

(*a*) 9 Bing. 605; 2 Mo. & Sc. 740; 1 D. P. C. 722.

(*b*) 4 Ea. 584.

(*c*) 6 Ea. 309. The Court pronounced no decision upon this point; but in the course of the argument, *Erskine*, J., observed, that *Mussellbrook* v. *Dunkin*, where it was held that an award is to be considered as *published*, when the parties have *notice* that it is ready for delivery, was decided upon the language of the Statute 9 & 10 *W.* 3, c. 15, s. 2, although thereby application was required to be made to the Court within a certain time after the award was "made and published *to the parties*," which was not required by the terms of the present reference.

(*d*) 4 B. & A. 539, in *K. B.*; and see same rule in *C. P.*, *M.*, 10 *G.* 4; 6 Bing. 349; 3 M. & P. 761.

(*e*) 1 Har. & Wol. 420; 3 A. & E. 200; 4 N. & M. 788.

(*f*) 3 Moo. 241. In that case the terms of the award were clear upon the face of it; but in *Ainsley* v. *Goffe* (*Kyd on Awards*, 351, cit. *Watson on Awards*, 162, 1st edit.), where it was plain that the award was not made on either legal or equitable grounds, *the Court called upon the arbitrators to make an affidavit of the grounds upon which they made their award.*

look at a letter, written by him, to explain the reason of his decision. *Williams* v. *Jones* (*g*). The Court will not interfere with the discretion of the arbitrator, *Symes* v. *Goodfellow* (*h*). The only case in which an arbitrator's judgment can be controlled is, when he states facts on the face of the award (*i*) The Court would not interfere to set aside a verdict upon an affidavit of what had been stated by the jury, as the grounds on which they had proceeded; and an arbitrator stands, for this purpose, in the place of a jury.

Wilde, Serjt., (with whom was *C. Powell*) *contrà*, was stopped by the Court.

TINDAL, C. J.—I am of opinion that upon the third ground of objection this award must be set aside. Two actions are brought against the defendants, one in their representative character, as executors, and another in their own right. These actions are referred to an arbitrator, leave being given to the heir to come in as a party to the reference. It appears that he does come in accordingly. The arbitrator finds that there is no ground for the second action: he finds that part of the work was done in the lifetime of the testator, and that the other part was done after his death, by the directions of the heir; and then it appears, by an affidavit of what the arbitrator himself has stated, that he has given the plaintiff judgment against the executors for the debt due from the heir. But it is urged, we ought not to hear an affidavit of what the arbitrator has disclosed; and I agree that in ordinary cases, we ought not to do so, as the parties have made him the judge of both the law and the fact. But in this case, the arbitrator, who is told that an application is about to be made to the Court, states the grounds upon which he has made his award, and this statement shews that he has exceeded his jurisdiction. Suppose this were the case of a reference of an action only, and the arbitrator were to say, "I interpret this to mean a reference of *all matters in difference*," and awarded accordingly; the Court must surely interfere to see whether he had interpreted rightly. And it appears to me, that it makes no difference whether he said so during the progress of the investigation, or after it was ended.

VAUGHAN, J.—I should be very slow to encourage a party to go to an arbitrator, and endeavour to extract from him the grounds upon which he had

(*g*) 5 M. & R. 3. It is there said by *Campbell, arguendo*, "In the late case of *The Ayre and Calder Navigation*, the Court set aside the award *upon matter contained in a letter written by one of the arbitrators*;" on which *Littledale*, J., observed, "That was to shew that the award extended to matters not within the submission." Reference is made to 4 M. & R. 728 (*Rex* v. *The Ayre and Calder Navigation*); but that case is upon a point of Sessions law, and has no bearing whatever upon the position mentioned in the text.

(*h*) 1 Hodg. 400; 2 N. C. 532; 2 Scott, 769; 4 D. P. C. 642.

(*i*) In *Richardson* v. *Nourse* (3 B. & Ald. 237), *Bayley*, J., said, (p. 239), "If the point (*of law*) had been considered questionable, the arbitrators might have been desired to state the facts upon the face of their award, for the opinion of the Court." In *Harris* v. *Thomas* (2 Gale, 197; 2 M. & W. 22), where all matters in difference were referred, but *no question of liability was to be raised*, the Court, *upon affidavits* shewing that the arbitrator could not have awarded the sum he did, except by rejecting a class of items, set aside the award, though nothing ambiguous appeared on the face of it.

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made his award; but here it appears the application to the arbitrator was made *bonâ fide*, and his answer given deliberately.

BOSANQUET, J.—I am of the same opinion. This was not a mistake, in a point of law, on the part of the arbitrator, but a mistake of the matters referred to him; a mistake as to his jurisdiction. The Court, therefore, are authorized to hear what he has said upon the subject; and he professes to have examined into matters that were not within his jurisdiction.

ERSKINE, J.—I am of the same opinion. It appears the enquiry was made expressly on purpose to apply to the Court; and I think it must be taken that the arbitrator assented to his statement being laid before us. This distinguishes the present case from those which have been cited. The arbitrator has assessed all the damages due from the heir, against the executors; he has, therefore, given damages to a greater extent than he had power to give. The Court could not, I think, have interfered, unless it had appeared that the arbitrator had mistaken his jurisdiction.

Rule absolute.

Jan. 12.

M'GEORGE *v.* EGAN.

In an action for educating a child, who had been placed with the plaintiff by defendant's wife, (who was her aunt), evidence is admissible to show that the wife was in the habit of ordering domestic articles, which were paid for by the defendant, in order to show her agency.

THIS was an action by a schoolmaster, for two months' board and education of a little girl, nine years of age.

At the trial, before the Under-sheriff, it appeared that she had been placed with the plaintiff by the defendant's wife, who was her aunt, that both she and the defendant occasionally went to see her at school. Evidence was also admitted (though objected to on the part of the plaintiff,) that the wife was in the habit of ordering articles, for household consumption, such as bread, &c., from different tradesmen, who were paid by the defendant. The plaintiff had a verdict, with leave reserved to the defendant to move for a nonsuit.

Humfrey now moved accordingly, and upon the ground that the above evidence was improperly admitted.

TINDAL, C. J.—I think there was a case, though a very slender one, to go to the jury. The niece was sent to the school by the instrumentality of the defendant's wife, and the evidence of her agency, though slender, was admissible.

BOSANQUET, J.—I am of the same opinion. There was evidence that the husband and wife had both called on the child at school, from which the jury were at liberty to draw their own conclusion. And as to the second point, the evidence was admitted to show that the wife was agent to her husband for certain purposes; and we cannot say that this was inadmissible, though certainly it was very slight.

The other judges concurred.

Rule refused.

DALTON *v.* GIBB.

Common Pleas.

Jan. 14.

Although a tradesman, before he trusts an infant, ought to make inquiries as to his circumstances, yet the conduct of the infant's parent may be such as to supersede the necessity of such inquiries.

Thus, where the mother of the defendant (a young lady under age) had accompanied her in her carriage to the plaintiff's shop, where the defendant had purchased goods:—*Held*, that it was not necessary for the plaintiff to make inquiries as to the defendant's circumstances.

ASSUMPSIT for goods sold: *Plea*, infancy; *Replication*, necessaries.

At the trial, before *Tindal*, C. J., the following facts appeared.—The plaintiffs were mercers; the defendant was a young lady under age, residing at an hotel in *Hanover-square*, with her mother, who kept a carriage; the defendant was in the habit of calling in the carriage at the plaintiffs' shop, and ordering goods, and on one occasion her mother accompanied her, but did not leave the carriage; some of the goods were taken home by the defendant, others were sent to the hotel, by her orders. The defendant had been heard to state that she had considerable expectations from her grandfather. Notwithstanding these appearances, however, the mother was, in fact, much embarrassed; her husband was living at *Calais*, and she was unable to discharge her account at the hotel, or to pay her servants' wages. The plaintiffs had made no inquiries as to the defendant's circumstances. The Chief Justice told the jury that the question for them was, whether the goods were necessaries; and that in deciding that question, they must take into consideration the defendant's apparent situation and circumstances. The plaintiffs had a verdict for 25*l.* 16*s.*, the balance claimed.

Hayes moved for a new trial, on the ground that the verdict was against evidence, and also on the ground of misdirection. The Chief Justice should have told the jury that it was the *real*, and not the apparent circumstances of a defendant, upon which the question would turn, whether or not articles supplied were necessaries; that it was incumbent on a tradesman before he trusted an infant, to inquire as to the circumstances of such infant, *Ford* v. *Fothergill* (*a*), *Cook* v. *Deaton* (*b*), *Story* v. *Pery* (*c*), *Bainbridge* v. *Pickering* (*d*). The fact of the defendant's riding about in a carriage, was only setting up one extravagance to justify another.

TINDAL, C. J.—I by no means wish to break into the wholesome rule, that before a tradesman trusts an infant for necessaries, he ought to make inquiries as to his circumstances, and how he is provided for by his friends; but I think a party may, by his own conduct, render such inquiries unnecessary. In this case it is shewn that the mother was living at a fashionable hotel, that she kept a carriage, and that at least upon one occasion, she went in that carriage to the plaintiff's shop where goods were purchased by the defendant. Under these circumstances, might not the jury fairly assume that the goods were subjected to the mother's inspection when sent to the hotel? It is clear that credit was not given to her, for she did not come out of the carriage, or in any way interfere with the purchase. The defendant is also proved to have stated that she had expectations from a relation. I, for one, think the verdict ought not to be disturbed.

(*a*) 1 Esp. 211; Peake, 229.
(*b*) 3 C. & P. 114.
(*c*) 4 C. & P. 526.
(*d*) 2 W. Bl. 1325.

Common Pleas.

DALTON v. GIBB

VAUGHAN, J.—It would be highly detrimental to break down or relax the rule which has been established for the protection of infants, to which I cordially subscribe; but in this case the conduct of both mother and daughter was calculated to lull suspicion; and therefore, this is an exception to the general rule.

BOSANQUET, J.—The only question in this case is, whether the goods supplied were necessaries: and I think that there is no ground to disturb the verdict, the evidence being sufficient to authorize it. I agree in the general proposition, that a tradesman should make inquiries as to an infant's circumstances; and certainly the most proper person to inquire of is the infant's parent. Now in this case, the parent comes with the young woman in her carriage, and surely it was not necessary that the shopman should go to the carriage, and ask the mother if she, countenanced by word, what she countenanced by her conduct. The mother's conduct was equivalent to her having answered an enquiry of the tradesman.

ERSKINE, J., concurred.

Rule refused.

Jan. 17.

PYBUS *v.* SCUDAMORE.

In an action for slander, the *venue* was laid in *L.*, the defendant had changed it to the county of *K.* on the usual affidavit; but the Court, upon affidavits, shewing that the subject matter of the alleged slander had been commented on in a newspaper which circulated in *K.*, accompanied with animadversions on the plaintiff, ordered the *venue* to be brought back, upon terms.

ACTION for slander, imputing perjury to the plaintiff, before a committee of the House of Commons. The *venue* was originally laid in *London*, but had been changed into *Kent*, before plea pleaded, on the usual affidavit.

Wilde, Serjt., had obtained a rule *nisi* to bring back the *venue* to *London*, upon affidavits, stating that the plaintiffs had been mayor of *Maidstone*, and shewing that considerable political excitement prevailed in that town upon the subject out of which the alleged slander had arisen; and that a *Maidstone* journal, which circulated generally in the county, had made comments upon the subject matter of the action, accompanied with ludicrous animadversions on the plaintiff.

Thesiger, Q. C., and *Channell*, shewed cause.—As the plaintiff was seeking a favour, the *onus* lay on him to make out a case for the interposition of the Court, which they contended he had not done. They cited *Briscoe* v. *Roberts* (*a*), *Hill* v. *Payne* (*b*), *Davies* v. *Lowndes* (*c*). They suggested that, as the truth or falsehood of the alleged slander would turn upon the locality of a certain building, it would be desirable to have a view.

Wilde, contrà, relied upon *Walker* v. *Ridgway* (*d*), *Rex* v. *Hunt* (*e*), and *Petyt* v. *Berkley* (*f*).

(*a*) 3 D. P. C. 434.
(*b*) *Ib.* 695.
(*c*) *Ante*, 272; and see the note to that case.
(*d*) 11 Moo. 486.
(*e*) 3 B. & A. 444.
(*f*) Cowp. 510.

TINDAL, C. J.—My mind has fluctuated considerably during the argument of this case; but I cannot distinguish it in principle from *Walker* v. *Ridgway*, where a new trial having been granted in an action by a clergyman against a farmer, for improperly setting out tithes (which was a local action), and anonymous letters having been inserted in the newspapers of the county where the cause was tried, reflecting on the character of the plaintiff, as a clergyman; the Court changed the *venue*. I cannot say but that the minds of the public may be in some degree tainted by the articles which have appeared in the *Maidstone* newspapers; and I think, therefore, that the plaintiff ought to have the cause tried in *London*, where the *venue* was originally laid; but as it has been suggested that it may be necessary to have a view of certain premises, we will make the rule absolute, upon the terms of the plaintiffs paying the costs of the view, and all other costs that may be incurred by the trial taking place in *London*.

The other judges concurring.

Rule absolute accordingly.

TYLER *v.* CAMPBELL.

Jan. 12.

AN award had been made in this case, ordering the defendant to pay the plaintiff a certain sum of money, and deliver up a quantity of wine; and an attachment had been obtained against the defendant for non-performance of such award. The defendant, having alleged that he could not deliver up the wine, inasmuch as he had sold it by the plaintiff's authority, and delivered the amount of the sale to him, it was agreed between the parties that the attachment should remain in the office till the defendant had satisfied the the Master that the wine had been sold, and for what sum; and if he paid the money, or delivered the wine within a stated time, the attachment was to be discharged on payment of costs. The defendant failed to do either at the time appointed, and thereupon the attachment issued, and the defendant paid for a part of the wine, and delivered the residue. The Master, on taxing the costs, disallowed the costs of the inquiry respecting the alleged sale of the wine.

Costs incidental to an attachment are considered as costs of the attachment itself: therefore, where an attachment had been obtained, but was suspended by agreement that an inquiry as to certain matters should take place before the Master, and ultimately the attachment issued:—*Held*, that the costs of the inquiry were costs of the attachment.

Wilde, Serjt., had obtained a rule *nisi* to review the taxation, against which,
Andrews, Serjt., shewed cause; and
Wilde, supported the rule.

TINDAL, C. J.—The costs which are fairly incidental to an attachment, must be considered as costs of the attachment, including, therefore, in this case, the costs of the inquiry as to the alleged sale; that inquiry being for the defendant's benefit and to enable him to obtain his discharge.

Rule absolute

Common Pleas.

Jan. 14.

An issue whether goods supplied to an infant were necessaries, is a question of fact for the jury.

It is not *imperative* upon a tradesman to make inquiries as to an infant's circumstances, before he supplies him with goods.

BRAYSHAW *v.* EATON.

ASSUMPSIT for goods sold. *Plea*:—Infancy. *Replication*, Necessaries. This action, which was brought to recover the amount of a tailor's bill, was tried before the Undersheriff of *Middlesex*, when it appeared that the defendant was under articles to an attorney in *London*, and resided in lodgings paid for by his mother, who lived at *Newcastle-under-Lyne*, and that he was supplied with all necessary clothing by a tailor employed by her: and that no inquiry had been made as to the defendant's circumstances by the plaintiff on the delivery of the clothes furnished by him. On the part of the defendant it was urged, that the plaintiff was bound to prove that he had made inquiries into the defendant's situation and competency to discharge the debt, previously to supplying him with the goods. The Undersheriff merely left it to the jury to say, whether the goods supplied were necessaries or not, regard being had to the defendant's station in life, and the clothes provided by his mother. The jury found for the plaintiff.

James, on a former day, obtained a rule *nisi* to enter a nonsuit, or to have a new trial, upon the ground of misdirection. He cited *Selw. N. P.* 128, *Ford* v. *Fothergill* (*a*), *Cook* v. *Deaton* (*b*), *Story* v. *Pery* (*c*), *Burghart* v. *Angerstein* (*d*), *Montara* v. *Hall* (*e*).

Wilde, Serjt., now shewed cause.—The omission of the plaintiff to make inquiries as to the defendant's circumstances is no ground for a nonsuit; if the goods were necessaries, the omission to inquire could not alter the case, if they were not necessaries, the fact of the plaintiff having made inquiries would not entitle him to recover. The whole question therefore was, whether or not the goods were necessaries for the defendant, and that was purely for the jury to decide upon. It was for them to say whether, from the defendant's appearance, the plaintiff was justified in supplying him with the clothes, which were not of an extravagant kind, or improper for the defendant's station in life. He cited *Maddox* v. *Miller* (*f*).—[*Bosanquet*, J.—There seems to be a very great difference in a judge leaving it to the jury to say, whether the things supplied are necessaries generally, or whether they are so under all the circumstances of the case.]—The question was properly left here and all the circumstances of the case were fully before the jury.

James, in support of the rule.—The real question to be presented to the jury in a case like this, is, whether or not there existed an actual necessity for the supply, and that must be shown to exist from all the circumstances of the case. In *Ford* v. *Fothergill*, it is expressly laid down by Lord *Kenyon*, "that the question of necessaries was a relative fact to be governed by the fortune or circumstances of the infant, and that proof of those circumstances lay on the plaintiff; and though it had been stated, that a tradesman had no business to inquire into what dealings an infant had with others, that he was of opinion the tradesman was bound to make such inquiry; and if the infant had con-

(*a*) 1 Esp. 211; Peake, 229.
(*b*) 3 C. & P. 114.
(*c*) 4 C. & P. 526.
(*d*) 6 C. & P. 690.
(*e*) 6 Sim. 465.
(*f*) 1 M. & S. 738.

tracted other debts at the same time, for the same sort of articles for which the action was brought, that such was good evidence to rebut the presumption of necessaries." Now in this case it was distinctly proved on the trial by the evidence of the mother, and of the landlady of the defendant, that he had been supplied with similar articles to those furnished by the plaintiff, and the latter was bound therefore to have made proper inquiries. In *Bac. Abr.*, "*Infancy and Age*" (I), it is said "strictly speaking, all contracts made by infants are either void (*g*) or voidable, because the contract is the act of the understanding, which during their state of infancy they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power in most cases to recede from and vacate it when it may prove prejudicial to them, and where they contract for necessaries, they are absolutely bound, and this likewise is a benignity to infants; for if they were not allowed to bind themselves for necessaries, no person would trust them; in which case they would be in worse circumstances than persons of full age. Therefore it is clearly agreed by all the books that speak of this matter, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic and such other necessaries; and likewise for his good teaching and instruction, whereby he may profit himself afterwards. But it must appear that the things were actually necessary." In *Comyn's Digest, Enfant* (B. 5), it is said that "the Court shall be judge of what things are necessary," citing *Cro. Eliz.* 583, a. The Undersheriff in this case should at least have directed the jury to find whether or not the plaintiff had made such inquiry, the *onus* being clearly upon him to show that fact.

TINDAL, C. J.—The issue which the jury had to try in this case was, whether or not the goods furnished by the plaintiff were necessaries. The goods were supplied it appears, without any inquiry having been made by the plaintiff as to the defendant's circumstances, or as to whether or not he was supplied with clothes from other quarters. And the question submitted for our judgment is, whether it is not an inflexible rule of law that a tradesman should satisfy himself of the above facts, previous to executing an order by an infant. No doubt it would be prudent and proper in a tradesman to do so; and the absence of such inquiry affords matter of strong observation to the jury. But the question for them remains the same, whether an inquiry has been instituted or not. The goods are not the less necessaries in default of inquiry, or because inquiry has been made, and produced no result. What is stated in the books as to its being the tradesman's duty to make enquiries into an infant's circumstances, must be taken according to a reasonable intendment; and to refer to a duty of imperfect obligation which one man owes to another. I find, however, no authority for saying as a matter of law, that such an inquiry is imperatively necessary, in order to entitle a tradesman to recover. On the contrary, in *Ford* v. *Fothergill*, (on which the defendant mainly relies), the plaintiff had a verdict against Lord *Kenyon's* direction, and it does not appear that any motion was made to set it aside. I am clearly of opinion, that there is no ground for a nonsuit here. Looking at the defendant's situation and the goods furnished, it appears to me the jury decided correctly in returning a verdict for the plaintiff.

(*g*) But see Burr. 566; 2 Str. 938; 2 Barnard. K. B. 174.

Common Pleas.

BRAYSHAW v. EATON.

VAUGHAN, J.—I am of the same opinion. None of the authorities warrant the proposition contended for by the defendant's counsel, namely, that inquiry is a condition precedent to the plaintiff's right to recover. The question of *necessaries* depends upon many collateral circumstances: the word has a very large and accommodating meaning. Considering the defendant's situation in life, the nature of the articles, and the prices charged for them, I think the finding of the jury correct. In *Story* v. *Pery*, and *Bainbridge* v. *Pickering* (*h*), it appeared that the infant was amply supplied by his parent.

BOSANQUET, J.—I do not say but that, if I had been on the jury, I might have come to a different conclusion from what they have arrived at; but that is not the question here: and I concur in the opinion that we ought not to grant a new trial. The fair result of the cases is, that a tradesman ought to make inquiries before he trusts an infant; but his omission to do so, does not subject him to a nonsuit. If a tailor supplies a reasonable quantity of clothes without inquiry, he does it at the risk of its turning out that they are not necessaries, by reason of the infant obtaining an ample supply elsewhere. The question in this case was, in my opinion, properly left to the jury, and their verdict does not appear to me to be so manifestly wrong as to justify the Court in interfering.

ERSKINE, J.—This was a question entirely for the jury. The absence of inquiry on the part of the plaintiff may afford strong matter of observation to them; but it cannot in any degree affect the issue as a matter of law. Nothing appears to have been withheld from the jury in this case, and I think the plaintiff entitled to retain his verdict.

Rule discharged.

(*g*) 2 W. Bl. 1325.

Jan. 17.

ABERNETHY and another *v.* PATON.

On 14th *June*, an interlocutory rule, obtained by the plaintiffs, was discharged with costs. On 13th *July*, he signed judgment for want of a plea; and the defendant to avoid execution, paid the debt and costs, insisting that he was entitled to set off the costs of the rule, but making no formal demand for them: the Court on motion, ordered the plaintiffs to repay the costs of the rule.

W. H. WATSON in last *Michaelmas Term*, had obtained a rule *nisi* to deduct the sum of 14*l.* 6*s.* 6*d.*, (being the costs of an interlocutory rule), from the plaintiffs' costs of the action (he having subsequently signed judgment for want of a plea), which had been paid by the defendant's attorney; and that the same should be repaid by the plaintiffs or their attorney,

Wilde, Serjt., in this Term shewed caused, and

Watson was heard in support of his rule (*a*).—The facts of the case

(*a*) He referred to R. 2 W. 4, § 93; *Holliday* v. *Lawes*, 3 Hodg. 130; 4 Sc. 475; 5 D. P. C. 636; *Marryott* v. *Clapp*, 1 D. P. C. 701; *James* v *Raggett*, 2 B. & A. 776.

sufficiently appear in the judgment of the Court, which, after time taken to consider, was now delivered by

TINDAL, C. J.—On the 14th *June*, 1838, a rule obtained by the plaintiffs to open a prior rule was discharged with costs, to be paid by the plaintiffs.

The costs were taxed at 14*l.* 6*s.* 6*d.*; which costs have never been paid except 3*l.* 7*s.* 8*d.*, the costs of a judgment, which the defendant obtained an order to set aside.

In some way or other the defendant has a right to these costs.

On the other hand, judgment was regularly signed by the plaintiffs; for want of a plea, on the 13th of *July*, and the costs thereon taxed on the 16th.

No formal or regular demand of the 14*l.* 6*s.* 6*d.* was ever made by the defendant on the plaintiffs; but the defendant always insisted on his right, to set them off against the plaintiffs' costs of the action, which the plaintiffs' attorney resisted, or at least never acquiesced in, though he knew it to be claimed; and the defendant's attorney, to avoid an execution, paid the debt and costs to the plaintiffs; and he now applies to the Court to deduct his costs of the rule, from the plaintiffs' costs of the action, and that the plaintiffs should pay all his costs from the 14th of *July*, and the costs of this application.

The costs of the rule are clearly due, and ought to be paid.

We cannot help thinking both parties in fault; the plaintiffs, because, knowing of this cross demand and that it was insisted on, they did not at once consent that it should be deducted; the defendant, because he never made a direct demand: he asked for more than he had a right to receive, and brought the party into Court upon this rather informal motion. The rule therefore must be absolute, for the payment, by the plaintiffs or their attorney, of what remains due of the costs of the rule, but without costs.

Rule absolute accordingly.

DOE, dem. LLOYD and others *v.* WILLIAMS.

Jan. 22.

WILDE, Serjt., had, on the part of the lessors of the plaintiff, obtained a rule *nisi*, to change the *venue* from *Radnorshire* to *Herefordshire*, upon affidavits, that there were but twenty-nine special jurymen in the former county; that the defendant's attorney had great influence there, and had many mortgages on small freeholds, situate in the same parish where the premises in question lay; that many of the jurors resided in the said parish, and that great excitement existed in the neighbourhood, and that the defendant was an old bone-setter, who had set the bones of many persons who might be on the jury.

It is no ground for changing the *venue* in a special jury cause, that there are but twenty-nine special jurymen in the county.

J. Evans, Q. C., now shewed cause, and produced affidavits denying the existence of any excitement on the subject; he argued, that if the rule were made absolute, it would be deciding that the defendant's attorney could not conduct any cause in his own county. There was no pretence for saying that there had been any unfair attempts to influence the jury.

Common Pleas.

DOE, dem. LLOYD v. WILLIAMS.

Wilde was heard in support of the rule.

TINDAL, C. J.—If we were to grant this rule, we should, in effect, say that no special jury cause could be tried in the county of *Radnor*. Should there be a failure of justice for want of jurors we can apply a remedy hereafter.

The other judges concurring.

Rule discharged; the costs to be costs in the cause.

Jan. 22.

RIPPON *v.* DAWSON.

By Stat. 2 & 3 W. 4, c. 64, (the Parliamentary Boundary Act), the town of *Newcastle-upon-Tyne* comprises the town and county of the town, and certain townships in the county of *Northumberland*: *Held*, that a writ of summons describing the defendant as "of *Newcastle-upon-Tyne*, in the county of *Northumberland*," was not, on the face of it, irregular.

A WRIT of summons having been directed to the defendant, as "of *Newcastle-upon-Tyne*, in the county of *Northumberland*," Mr. J. *Coltman*, at chambers, made an order to set it aside, as being bad upon the face of it, *Newcastle-upon-Tyne* being a town and county of itself.

Corrie had obtained a rule *nisi* to set aside the above order, on the ground that, by the Statute 2 & 3 *W.* 4, c. 64, (the Parliamentary Boundary Act), several townships in the county of *Northumberland*, were included within the boundary of *Newcastle-upon-Tyne* (*a*). He cited *Jelks* v. *Fry* (*b*).

Wilde, Serjt., now shewed cause.—The Statute had reference only to the residence of electors for parliamentary purposes. The defendant here is described generally as of *Newcastle-upon-Tyne*, in the county of *Northumberland*, and the Court will take judicial notice that that town is a county of itself.

Corrie, in support of the rule.—The Court cannot take judicial notice that there is not a place called *Newcastle-upon-Tyne* in the county of *Northumberland*; and, therefore, the writ of summons is not bad on the face of it. Besides, the defendant may reside within any of the townships and places annexed to the borough by the Act in question, which was not brought before the attention of the learned judge at chambers.

TINDAL, C. J., (after reading the section of the Act and the schedule).—I think we should have been bound to take judicial notice that the town of *Newcastle-upon-Tyne* is a county of itself; but we must also look to the Act of Parliament; and we find thereby, that the place called *Newcastle-upon-Tyne* comprises other parts beyond the mere precincts of the town. The defendant does not shew that he lived in that part of the town which is within the county of the town. The rule, therefore, must be absolute.

(*a*) Section 35 enacts, "That the several cities, boroughs and places specified in the schedule, marked (O), shall as to the election of members of Parliament, respectively include the places, and be comprised within the boundaries which in such schedule are respectively specified and described, in conjunction with the names of such cities, boroughs, and places respectively." Schedule (O), § 26: "*Newcastle-upon-Tyne*; the town and county of the town of *Newcastle*; and the several townships of *Byker*, *Heaton*, *Jesmond*, *Westgate* and *Elswick*."

(*b*) 3 D. P. C. 37.

VAUGHAN, J., of the same opinion.

BOSANQUET, J.—I am of the same opinion. The whole of the facts were not laid before the learned judge at chambers; and I am not surprised at the order being made, the Act not having been referred to.

ERSKINE, J.—It does not appear from the affidavits that the defendant lives in the town and county of *Newcastle-upon-Tyne*.

Rule absolute.

WHALLEY *v.* WILLIAMSON.

Jan. 22.

THIS was an action of trespass, *quare clausum fregit*, tried before *Alderson*, B., at the *Stafford* Spring Assizes, 1836, when a verdict was found for the plaintiff, with 1*s.* damages. The defendant's counsel applied at the time for a certificate, under 43 *Eliz.* c. 6, s. 2, to deprive the plaintiff of his costs. The judge took time to consider, and subsequently, at *Gloucester*, before the circuit was over, did so certify, by indorsement on the record.

In *May*, 1837, an application was made by the plaintiff to the judge, in *London*, to withdraw his certificate, who, after hearing both parties, directed the certificate to be erased.

The plaintiff's costs having been subsequently taxed,

R. V. Richards, Q. C., obtained a rule to suspend the Master's *allocatur*, whereupon

Ludlow, Serjt., in last *Michaelmas Term*, obtained a rule *nisi* to tax the plaintiff his costs; against which

Richards, *V. Lee*, and *Pike* now shewed cause.—A judge, having once certified under the Statute of *Elizabeth*, has no power to revoke his certificate. Before the Statute of *Gloucester*, a plaintiff was not entitled to costs, they were given by that Statute; and the 43 *Eliz.* c. 6 (*a*), is a restraining Act, and limits the effect of the Statute of *Gloucester*; the judge who tries a cause is thereby required to certify, if the damages recovered are under 40*s.*; and though such certificate may be indorsed on the *postea* afterwards, (even after taxing costs, *Foxall* v. *Banks*) (*b*), yet, when once indorsed, it is final: it is a power

Where a judge has once certified to deprive the plaintiff of his costs, under 43 *El.* c. 6, *query*, whether he has power to rescind his certificate?

But assuming he has such a power, it is at any rate too late to exercise it after the first four days of the Term following the trial.

(*a*) Section 2 enacts, "That if upon any action personal to be brought in any of her Majesty's courts at *Westminster*, not being for any title or interests of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same Court, and so signified and set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to the sum of 40*s.* or above, in every such case the judges and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto but less at their discretions."

(*b*) 5 B. & A. 536; See also *Holland* v. *Gore*, 3 T. R. 38 (n).

conferred by the Statute which, when once executed, cannot be revoked. But, assuming that the judge might revoke his certificate, he ought to do so within a reasonable time after granting it; and he clearly can have no such power after the expiration of the commission under which he tried the cause; for as the power cannot belong to him personally, he is then no longer the judge who tried the cause.—[*Tindal*, C. J.—It is very common for a judge to settle a special case, or amend a *postea* after the commission, under which he has acted, has expired.]—That is only done by consent.—[*Bosanquet*, J.—In *Richardson* v. *Mellish* (*c*), this Court amended the *postea* by the notes of Lord *Gifford*, after he had been appointed master of the rolls, although the amendment was resisted by the other side.]—That case depended upon its own circumstances; it was tried at *Guildhall*, where there is no commission; and Lord *Gifford* had declined to interfere, though the amendment was recommended by his lordship. In the case of a certificate for a special jury, the judge must make the certificate immediately after the trial, *Waggett* v. *Shaw* (*d*). If a Serjeant had tried the cause, surely he could not alter the record after his commission had expired. In *Anderson* v. *Sherwin* (*e*), an application to revoke a certificate was made in the ensuing Term, before the next Assizes, whilst the commission was running. In the present case, the alteration was made after the time at which the judgment might have been signed; it should have been done within the first four days of the Term ensuing the trial; otherwise, the defendant is deprived of his opportunity of moving for a new trial, which he might have been willing to do if he had considered himself liable to the plaintiff's costs. The recent Acts which authorize a judge at *Nisi Prius* to amend the record in certain instances (*f*), have no application to such a case as the present.

Ludlow, and *Carrington*, in support of the rule.—No time is prescribed by the Statute of *Eliz.*, within which the judge shall make his certificate, nor is the judge at *Nisi Prius* to be considered as *functus officio* till final judgment is signed. Under the 22 & 23 *C.* 2, c. 9, a certificate that a battery was proved may be granted at any time before final judgment, *Johnson* v. *Stanton* (*g*): so under the 8 & 9 *W.* 3, c. 11, that the trespass was wilful, *Wooley* v. *Whitby* (*h*). In *Bondfield* v. *Milner* (*i*), a *qui tam* declaration for usury, which was a penal action, was allowed to be amended, as to the date, while all remained in paper. So in *Mace* v. *Lovett* (*j*), even after the record was drawn up.

TINDAL, C. J.—It is a very different question, as to what time a judge may take to make a certificate, under the Statute of *Elizabeth*, and within what time he may rescind it, if at all. When the certificate is once granted, it is notice to the defendant that he will not be called on to pay the plaintiff's

(*c*) 3 Bing. 334; 11 Moo. 104; 1 B. & C. 819.

(*d*) 3 Camp. 316. The Statute 24 Geo. 2, c. 18, expressly requires the judge to make such certificate "immediately after the trial."

(*e*) 7 C. & P. 527.

(*f*) 9 Geo. 4, c. 15; 3 & 4 W 4, c. 42, s. 23.

(*g*) 2 B. & C. 621; 4 D. & R. 156; See also *Butler* v. *Cozens*, 11 Mod. 198.

(*h*) 2 B. & C. 580; 4 D. & R. 147. See also *Reynolds* v. *Edwards*, 6 T. R. 11; *Swinnerton* v. *Jervis*, Id. 12, (n.) So of a certificate under 7 J. 1, c. 5, to entitle the defendant to double costs, *Harper* v. *Carr*, 7 T. R. 448.

(*i*) 2 Burr. 1098.

(*j*) 5 Burr. 2833.

costs; and the judge, if he has the power to rescind this order, certainly ought, within a reasonable time, to intimate the alteration of his opinion. The Statute gives no express power to rescind a certificate, where it has been once granted; but it may be expedient, perhaps, that, under some circumstances, the judge should have the power to do so; for I think it may be fairly inferred, that the legislature intended that a party should have the benefit of the best judgment of the judge; thus, I can imagine a case of mistake, or of some circumstance coming to a judge's knowledge, in which it might be proper to revoke his certificate, *quia improvide emanavit*, but he should not interfere with the vested rights of the defendant. The course of practice is, that the certificate is indorsed on the record; probably it was formerly entered on the judgment roll. I do not say that the judge may not in any case amend this indorsement; but, I think, that after the fourth day of the Term, when, by the practice of the Courts, the judgment might have been signed, the withdrawal of the certificate would place the defendant in a new situation, and deprive him of the opportunity of moving for a new trial, which, relying on the certificate, he may have been induced to forego. Without, however, giving any opinion, as to the power of the judge to revoke his certificate, I think, at all events, such a power must be exercised within a reasonable time, and that it has not been so exercised in the present case, and, consequently, that this rule must be discharged.

VAUGHAN, J.—I am of the same opinion. It seems to be admitted, that the judge may take time to consider whether or not he shall grant a certificate; but, having once done so, then comes the question, as to whether he may rescind it. I beg that nothing I shall say may convey it as my opinion that a judge has such a right, having once executed the authority vested in him by the Statute. In *Anderson* v. *Sherwin*, the judge's authority was not contested, so that the case is of no great weight. It would, however, be manifest injustice to a defendant if a power of revoking could be exercised after the first four days of Terms, within which a party is bound to move for a new trial, unless he has very good reasons for not doing so; at any rate, if the certificate can be revoked at all, it should be done within a reasonable time. Now in this case, fourteen months have elapsed from the time when the certificate was granted to the period of its revocation, and can it be said that this is a reasonable time? I must, however, protest against being supposed to accede to the doctrine that the judge has the power to rescind at all.

BOSANQUET, J.—Assuming that the judge has the power to rescind his certificate, I think it should be exercised within a reasonable time. In *Anderson* v. *Sherwin*, there had been no intermediate Assizes; and, therefore, my brother *Patteson*, who tried the cause, was still the judge in that commission. In some cases, I think the power to rescind the certificate may be useful. Two cases have been cited, *Johnson* v. *Stanton* and *Woolley* v. *Whitby*, to show that under certain Statutes a judge may grant his certificate at any time before final judgment; but the power of *suspending* a certificate is a very different thing from the power of amending or of rescinding it.

ERSKINE, J.—I am of the same opinion. Cases have been cited to shew that the *postea* may be amended according to the judge's notes; but there

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no discretion is exercised on the part of the judge; his notes are but a test of the facts proved at the trial. Here there is a discretionary power called into action, which, if it can be exercised at all, should be exercised within a reasonable time.

Rule discharged.

Jan. 23.

STONE and others *v.* COMPTON.

Upon the argument of a special case, the Court, having ordered judgment to be entered for the defendant, subsequently, at the plaintiffs' instance, directed a nonsuit to be entered instead.

IN last *Michaelmas Term* the Court on giving judgment in this case (*a*), directed that *judgment* should be entered for the defendant on the second issue, and that the jury should be discharged as to the others.

Wilde, Serjt., in this term, on the part of the plaintiffs, obtained a rule *nisi* that a nonsuit should be entered instead of the judgment on the second issue.

Sir *W. Follett*, Q. C., shewed cause, and submitted that as a nonsuit had not been requested at the time, and the entire argument had reference only to the entering of the verdict one way or the other, the Court had no power now to alter the judgment.—[*Tindal*, C. J.—The defendant will be benefited by the nonsuit.]—Only as to the costs. The plaintiffs, if the nonsuit is entered will have the power to bring another action.

TINDAL, C. J.—Our attention was not called at the time to the point; we certainly had the power to enter a nonsuit. It is clearly a mistake. We meant the plaintiffs to have judgment had they been successful; if otherwise, that they should be nonsuited.

Rule absolute.

(*a*) *Ante*, p. 436.

Jan. 25.

SMITH *v.* NICHOLLS.

A plea, to a count in trover, of a judgment recovered by the plaintiff against the defendant in a foreign court for the same cause of action: *held*, bad; especially as it appeared on the record that the defendant was not within the jurisdiction of such Court at the time of the commencement of the suit there, nor from thence to its termination.

The plea stated the judgment recovered in a foreign Court "*prout patet per recordum:*" this is not a sufficient averment that such Court is a Court of record; (per *Bosanquet*, J.)

A Vice-Admiralty Court abroad is not a Court of record.

CASE. The sixth count was in *trover* for a ship and goods on board thereof.

Fifth plea, (to the sixth count,) that before and at and during the times in the last count mentioned, the defendant was a public officer of our lord the king, to wit, governor and superintendent of a certain island, then parcel of his majesty's possessions in parts beyond the seas, called *Fernando Po*, and one of the justices assigned to keep the peace of our lord the king in and for the said island, the said island then being within the jurisdiction of the Court of Vice-Admiralty, of and for and held within his

majesty's colony of *Sierra Leone*: that he, being such public officer and justice as aforesaid, and believing that a breach of the navigation laws had been committed by the plaintiff with the said ship and boat, within the said jurisdiction; and that the said ship and boat and the goods on board of the ship were liable to forfeiture, and that it was his duty, as such public officer and justice, to cause the ship and boat, with the goods then on board thereof, to be conveyed to *Sierra Leone* for adjudication in the said Court, did, to wit, on, &c., within the said jurisdiction, cause the said ship and boat and the goods then on board of the ship to be, and the same ship, boat and goods thereupon were, seized by the crew of a certain ship employed in his majesty's service in that behalf; and thereupon the defendant then and there caused the same ship, boat and goods of the plaintiff to be, and the same thereupon then were, conveyed to *Sierra Leone* aforesaid, for adjudication in the said Court, on the matters there to be alleged in respect of such breach of the said laws; and thereupon, then caused the same ship, boat and goods to be, and the same were then detained at *Sierra Leone*, for a certain space of time, to wit, for the space of three weeks; at the expiration whereof, to wit, on, &c. the said ship, boat and goods were restored to and received back by the plaintiff, he then being discharged and acquitted of the said breach of navigation law: that in so causing the ship, boat and goods to be seized, conveyed and detained, as aforesaid, and not otherwise, he converted and disposed thereof, in manner and form as the plaintiff had above in that behalf complained against him; that before the commencement of this suit, to wit, on, &c. the plaintiff impleaded the defendant in the said Court of Vice-Admiralty, the same Court then and thenceforth continually having jurisdiction in the premises, of and concerning the causing the said ship, boat and goods to be seized, conveyed and detained, as aforesaid, and for all the damages by the plaintiff sustained on occasion thereof; and the plaintiff then claimed and sued for such damages in such plea, in the said Court as aforesaid; and such proceedings were thereupon had in the said Court, that afterwards and before the commencement of this suit, to wit, on, &c., a sentence and decree were made and pronounced in and by the said Court in the said plea, and in and upon the matters of the said claim and suit; and by that sentence and decree it was ordered and adjudged that the defendant should pay to the plaintiff the damages by the plaintiff sustained on occasion of the premises, with costs and expences; the amount of such costs, damages and expences to be ascertained and reported to the said Court by the registrar thereof, as by the said proceedings and the record thereof will more fully appear; and thereupon afterwards, and before the commencement of this suit, to wit, on, &c., the registrar of the said Court did ascertain and report to the Court that such costs, damages and expences amounted to a certain sum of money, to wit, 450*l.* 5*s.*; and which report was afterwards and before the commencement of this suit, to wit, on, &c., read and affirmed by the said Court; which sentence, decree, and affirmance, have not been in anywise reversed or made void. *Verification.*

Seventh plea, (to the same), that before and at and during the times in the same count mentioned, the defendant was a public officer, to wit, governor, &c., of *Fernando Po*, &c., and one of the justices, &c.; that at the said times when, &c., the said goods were in and upon the said island, and that before any of the said times when, &c., to wit, on, &c., the plaintiff left the island, and from thenceforth continually until and during and at and after the said

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times when, &c., remained and was absent from the said island; and that during all the said times when, &c., there was no one on the part of the plaintiff in charge of the same goods, and the same were, by reason thereof, in danger of being lost or stolen; whereupon the defendant, then being such public officer and justice as aforesaid, and believing that it was his duty as such public officer and justice, so far as in him lay, to protect and take care of property in the island left unprotected, and to dispose of the same in the way most consistent with the interests of the owners thereof, and that it was for the interest, and would prove consistent with the wishes, of the plaintiff, that the said goods should be disposed of as hereinafter-mentioned, and for the purpose of preventing the plaintiff from being deprived of and losing the same goods, and in order to procure for and preserve to the plaintiff all the benefit and advantage that could be derived therefrom, did, to wit, on, &c., cause the same to be, and the same were thereupon, taken and collected by and into the hands of certain public officers of the island, by the defendant in that behalf directed and authorized; and thereupon the said goods then were sold and disposed of for the most money that could be reasonably gotten for the same; which, after deducting certain expences and necessary payments thereout, then amounted to a certain large sum of money, to wit, 5000*l.*; and thereupon the defendant then caused the sum to be, and the same then was, remitted to certain other persons, to wit, the Lords Commissioners of his Majesty's Treasury, for the purpose of being paid over to and received by the plaintiff in full satisfaction and discharge of the cause of action in the last count mentioned, and all damages by the plaintiff sustained on occasion thereof: that afterwards, and before the commencement of this suit, to wit, on, &c., the plaintiff accepted and received the same sum of money from the same persons, in full satisfaction and discharge of the cause of action in that count mentioned, and all damages by him sustained on occasion thereof: that in so causing the said goods to be collected and taken and disposed of and dealt with as aforesaid, and not otherwise, the defendant converted and disposed of them in manner and form as the plaintiff had above in that behalf complained against him. *Verification.*

Replication to the fifth plea, that the defendant was not in the colony of *Sierra Leone*, or at any place within the jurisdiction of the Vice-Admiralty Court, before or at the time of the commencement of, or at any time during, the proceedings in the said Court, in the matter of the said claim and suit in the said Vice-Admiralty Court, in that plea mentioned; nor was the defendant, at any time before the making or pronouncing of the said sentence and decree in the plea mentioned or the making or affirming of the report therein mentioned, in any manner according to the course and practice of the said Court in the said matter or in anywise notified, nor did the defendant then know of the same proceedings, or any of them, so that the defendant could or might by himself, or his proctor, attorney or other agent, by him appointed and instructed in that behalf, appear or plead, or in anywise defend himself in the matter of the said claim and suit; nor did the defendant appear in or to any or either of the said proceedings; whereby the said sentence and decree and affirmance were and are contrary to natural justice, and wholly inoperative and void; and all remedy thereon for the recovery of the damages and costs and expences, for which the sentence and decree and affirmance were made and given, was and is lost to the plaintiff, and the defendant

always resisted and impeached the said sentence and decree and affirmance, on that account, and the same continued so inoperative and void; and that the plaintiff had not ever obtained or been able to obtain the said damages, costs and expences, or either of them, or any part thereof in the plea stated to have been adjudged to him; and the said sentence and decree and affirmance still remained so unsatisfied, and without force or effect. *Verification.*

To the seventh plea. That at the said times, when, &c., in the last count mentioned, divers persons and servants of the plaintiff had the charge of the said goods for the plaintiff, and on his behalf; and the same were not, nor was any part thereof, in danger of being stolen or lost; and the defendant, well knowing the same, wrongfully caused the said goods to be taken and sold and disposed of, otherwise than for the purpose of preventing the plaintiff from being deprived of or losing the same, or in order to procure for and preserve to the plaintiff the benefit and advantage that could be derived therefrom; and that the plaintiff did not accept or receive the said sum of 5000*l.* in full satisfaction and discharge of the cause of action, and all damages sustained on occasion thereof; concluding *to the country.*

Special demurrer to the replication to the fifth plea, on the ground that the plaintiff was estopped from asserting against the defendant the nullity of the judgment admittedly obtained by him against the defendant; that the judgment, not being shewn to have been in any way reversed or made void, was a subsisting bar to an action for the same cause of action; that the replication did not sufficiently shew that the judgment was void, or that it had been deprived of efficacy; that the subsistence and validity of the said judgment, in law, were consistent with the truth of all the matters disclosed in the replication; that the replication was too general, and did not sufficiently shew how, as alleged, all remedy on the judgment was lost to the plaintiff, or how, as alleged, the defendant had impeached the said judgment; that the replication was double and multifarious, and attempted to set up various distinct matters by way of reply—that is to say, that the judgment was void, that all remedy thereon had been lost, that the defendant had impeached it, and that the plaintiff had derived no benefit from it: that the replication contained irrelevant and surperfluous matter, and that no simple and sufficient issue could be taken thereon; that it traversed mere matter of inducement, and took immaterial issues; that it raised a negative payment, by denying the judgment concerning the causes of action stated, leaving it doubtful whether the judgment or the identity of the causes of action was denied, or both; that it departed from the count which was in trover, by shewing the cause of action to be in trespass.

To the replication to the seventh plea, on the ground that it traversed mere matter of inducement, and raised immaterial issues; that it was double and multifarious; and that it departed from the count in trover.

J. Henderson, in support of the demurrer.—As to the replication to the fifth plea, admitting that the judgment in the Colonial Court is incorrect, the plaintiff ought to have set it aside; for it is not void, although it may be voidable. If the Court had no jurisdiction over the subject matter, the judgment would be void; but jurisdiction is alleged here by the plea, and is not denied by the replication. If an officer at *Sierra Leone* had seized the defendant's property under an execution, neither trespass or trover could have

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been maintained against him, *Ladbroke* v. *Crickett* (*a*). The plaintiff contends, that the judgment is wholly void, by reason of the defendant's absence: but that is not so; it is like a judgment of outlawry, obtained in the parties' absence, which is valid, until reversed; it is a mere irregularity in the proceedings. But even if the replication were an answer to the plea, the plaintiff is estopped from relying upon it, as he cannot insist on the nullity of the proceedings which were instituted by himself. The Courts at *Westminster* do not sit as Courts of Error from the Colonial Courts, nor will they interfere with their judgments, unless they are shewn to be manifestly against the law of the country where such judgments were pronounced, *Tarleton* v. *Tarleton* (*b*), *Becquet* v. *M'Carthy* (*c*), *Martin* v. *Nicolls* (*d*), *Douglas* v. *Forrest* (*e*), *Le Caux* v. *Eden* (*f*), *Burrows* v. *Jemino* (*g*).

As to the replication to the seventh plea, it is clearly a departure from the count in trover; the plea stated an actual finding, and justified the conversion; but the replication stated a cause of action in trespass.—[*Tindal*, C. J. —Has not a party an option to waive the trespass, and bring trover?]—It is submitted not, if he shews facts that constitute a trespass.—[*Bosanquet*, J. —If he were to give such facts in evidence in an action of trover, would he be nonsuited?]—It may be admitted, that he would not; but the pleadings here are inconsistent, which is a very different question.

He also insisted upon the duplicity of the replications, and the other grounds of objection stated in the demurrer.

W. H. Watson, *contrà*.—The fifth plea is itself bad. There is no decision that the judgment of a Colonial Court, not followed by execution, is a bar to an action in this country; the plea has assimilated the foreign judgment to a judgment recovered here; but a foreign judgment stands upon the footing of a mere contract between the parties; it amounts to an accord, as to the *quantum* of the debt, without satisfaction. A judgment in the inferior Courts of this country is of a very high nature, binding and conclusive as to the merits of the cause, the jurisdiction of the Court, and the summons and appearance of the parties; and it can only be reversed by error. If a party is sued upon it, he cannot set up fraud as a defence: even between privies it acts as an estoppel. In the scale of remedies, a debt of record ranks higher than debts upon simple contract or specialty. There is no analogy, therefore, between a debt of record in this country and a debt ascertained by a colonial judgment, for the latter may be questioned; the party against whom it was given may say that he never was summoned, or he may deny the jurisdiction of the Court, 1 *Phil. Ev.* 500 (*h*). In *Buchanan* v. *Rucker* (*i*), it was held, that no action will lie upon a foreign judgment, on the face of which it appears that the defendant, not resident within the jurisdiction of the foreign Court, was neither served with process, nor came in to defend the action, although such judgment may have been obtained according to the course and practice of the Court in similar cases. In *Hall* v. *Odber* (*j*), Lord *Ellenborough* said, "Judgments in foreign Courts are not to be consi-

(*a*) 2 T. R. 649.
(*b*) 4 M. & S. 20.
(*c*) 2 B. & Ad. 951.
(*d*) 3 Sim. 458.
(*e*) 4 Bing. 686; 1 M. & P. 663.
(*f*) Doug. 594.
(*g*) 2 Str. 733.
(*h*) Last ed.
(*i*) 1 Camp. 63; 9 Ea. 192.
(*j*) 11 Ea. 118.

dered upon the same footing as judgments in our own Courts of record; they are but evidence of the debt; they do not bar or stay an action on simple contract; but *assumpsit* lies on them, and it is open to the parties to enter into the question of their regularity." The very fact that *assumpsit* will lie on a foreign judgment, shews that it is not of a higher nature than a simple contract. So if a party sues in debt on a foreign judgment, he ought not to conclude *prout patet per recordum; Walker* v. *Witter* (*k*). In the administration of assets, a foreign judgment would only rank as a simple contract debt. The defendant should, at any rate, have pleaded that this judgment was binding in the colony. In *Plummer* v. *Woodburne* (*l*), it was held, that a judgment, obtained by a defendant in the Colonial Courts, cannot be pleaded by way of estoppel to a declaration in this country for the same cause of action, unless it is shewn that the judgment so obtained would be final and conclusive in the colonies; and in that case, as reported in *Dowling and Ryland*, there are some important observations given of the different judges. *Bayley*, J., says, "The difficulty I have had is, that we are ignorant what the law of *St. Christopher's* is, whether a judgment in that island would be conclusive or not. It would be hard to hold that what is not conclusive there would be conclusive here." * * * * "The pleas allege merely that the jury found for the defendant upon, and agreeably to, the said verdict. This does not necessarily imply a final and conclusive decision in the defendant's favour. You plead this by way of estoppel. Now the law says, that estoppels are odious, because they may tend to defeat the justice of the case." And *Littledale*, J., adds, "Perhaps the plaintiff, after his case had gone a certain length, might elect to be nonsuited, or he might have been turned round on some technical objection." * * * * "In some countries, a plaintiff cannot be nonsuited; and, therefore, he may be obliged to go on and have a verdict found against him, so as to be shut out the real merits" *Bayley*, J., also says, "You do not tell us, by your pleas, that, by the laws of *St. Christopher's*, such a decision would be final and conclusive here." And *Holdroyd*, J., says, "It does not clearly appear from the record that the judgment was conclusive. We cannot take notice of the law of the colonies (*m*)." The cases which have been cited on the other side, are where the foreign judgment has been *in rem*, and they have no application to the present case. The judgment cannot be treated as an estoppel, as it is not mutual; and, notwithstanding its effect, the defendant might still proceed against the plaintiff on matters arising out of the same dispute The plea under discussion sets forth a long and useless introduction; but does not state that the defendant appeared, or that he had any cognizance of the proceedings.

As regards the seventh plea, it is, to say the least, in a very unusual form —[*Tindal*, C. J.—The important part of that plea seems to be the allegation that a certain sum was paid over to the plaintiff by way of satisfaction: why did not the plaintiff take issue upon that?]—Perhaps it might have been the better course; but, nevertheless, the plea is insufficient; for it states satisfaction without accord, *Grimes* v. *Blofield* (*n*), *Peytoe's Case* (*o*).

As to the replications.—[*Tindal*, C. J.—The inclination of the Court being at present against the validity of the fifth plea, you may confine your attention

(*k*) Doug. 1.
(*l*) 4 B. & C. 625; 7 D. & R. 25.
(*m*) Pp. 39, 40, 41.
(*n*) Cro. Eliz. 541.
(*o*) 9 Rep. 76, 80, b.

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to the replication to the seventh plea.]—The principal objection relied on is, that it discloses a cause of action in trespass instead of trover, and, therefore, is a departure from the declaration; but a party may waive a trespass, and bring trover, *Branscomb* v. *Brydges* (*p*), *Foster* v. *Allanson* (*q*).—[*Tindal*, C. J.—The short answer to that objection is, that what is urged as a departure in pleading would amount to a variance in evidence.]—The replication tenders an apt and formal issue. Then the doctrine of duplicity does not apply to this case; for the prefatory matter in a plea is always immaterial; and with some few exceptions, mentioned in *Crogate's Case* (*r*), a party may deny more than one fact.—[*Tindal*, C. J.—The rule is, that where several distinct propositions make one defence the plaintiff may traverse them all, but otherwise not.]—The question of duplicity has been much misunderstood; it means, in reality, that two defences are set up: the general issue, before the new rules, put in issue a great variety of facts.—[*Vaughan*, J., referred to *Bardons* v. *Selby* (*s*), —*Tindal*, C. J.—Even the replication of *de injuriâ* is applicable only where the defence consists merely of matter of excuse.]—Many of the facts alleged in this plea are immaterial; there is a long prefatory inducement, with a round-about statement of accord and satisfaction, and the traversing such matter will be surplusage, and will not vitiate the replication, *Stephen on Pleading*, 419; *Bac. Abr. Pleas and Pleading* (I.) 4.—[*Tindal*, C. J.—Would it not be better to amend this replication by striking out the traverse of the prefatory matter in the seventh plea? I will not say that that plea might not have been held bad on a special demurrer; but I think it is sufficient in the present state of the pleadings.]

Watson, therefore, elected to amend the replication to the seventh plea accordingly.

Henderson.—The argument is then confined to the fifth plea. If the judgment of the foreign court is sufficient upon the matter in dispute, *transiit in rem judicatam*, and there is an end to the question. The authorities upon the subject are collected in 1 *Stark. Ev.* 228; and the principle deduced from them is thus laid down: "The above general rule, that a judgment by a Court of competent jurisdiction upon the same matter, between the same parties, and for the same purpose, is conclusive, appears to comprehend not only all adjudications by the Courts of this country, whether of record, or not, but also those of foreign Courts. It has, indeed, been suggested, that the judgments of the Courts in this country which are not of record, afford mere *primâ facie* evidence of the subject matter to which they relate, and are liable to be controverted by opposite evidence. This position does not, however, seem to be warranted by any decision, or to be tenable upon principle." But even if the exception here suggested were correct, it would not apply to this case; for it must be inferred from the plea that the Court at *Sierra Leone* is a Court of record.—[*Tindal*, C. J.—It is a Vice-admiralty Court, and not a Court of record.]—That is a point I am not prepared to argue. All that is contended for, on the part of the defendant, is, that the foreign

(*p*) 1 B. & C. 145; 2 D. & R. 246; 3 Stark. 171.
(*q*) 2 T. R. 479.
(*r*) 8 Rep. 66.
(*s*) 3 B. & Ad. 2; 1 Cr. & M. 500; 3 Tyr. 431; 9 Bing 756; 3 Mo. & Sc. 280.

judgment is *primâ facie* final, and confers a *primâ facie* right. The cases cited on the other side, in which it appeared that the party was not within the jurisdiction of the foreign Court at all, have no application here; for it does not appear that the defendant was not within the jurisdiction before the commencement of the suit.—[*Watson.*—The replication avers that the defendant was not within the jurisdiction "before or at the time of the commencement of or at any time during the proceedings of the said Court."]—If the Court conceives that makes any difference, I would crave leave to amend by traversing that allegation, instead of demurring to the replication.—[*Tindal*, C. J.—At present I have a strong opinion that the plea is bad; the better way would be to strike out the words "before or" in that allegation; then the replication will stand that the defendant was not within the jurisdiction at the commencement of the proceedings, or at any time afterwards; argue it upon that supposition.]—The former argument will then still apply. In *Becquet* v. *M'Carthy*, although the defendant was absent during the whole of the proceedings, yet, as he had formerly resided there, and the monition had been duly served, according to the practice of the foreign Court, upon the *procureur du roi*, the judgment was upheld. *Arnott* v. *Redfern* (*t*), *Obicini* v. *Bligh* (*u*), and *Burrows* v. *Jemino*, shew that foreign judgments are entitled to credence, by the comity of nations. Supposing that the highest effect that can be given to a foreign judgment is that it is equipollent with an award, still it is binding upon the parties until impeached. With regard to the estoppel, all that is contended for is, that the plaintiff is estopped from disputing the effect of the foreign judgment. It is contended, on the other side, that an estoppel must be mutual, and that is undoubtedly true of strict estoppels; but there are estoppels, known to the common law, where that rule does not apply: such, for instance, as the rule that a party shall not avail himself of his own wrong.

The first general proposition, therefore, is, that a regular foreign judgment is a bar to an action here, that the rights of parties are thereby changed, and that it is final and conclusive between them. But, secondly, if not absolutely final, still it is to be considered as valid until impeached.

TINDAL, C. J.—It appears to me, that the fifth plea is substantially bad. This is an action to recover damages for seizing the plaintiff's ship and goods on board thereof; and the fifth plea states, in substance, that the plaintiff brought an action against the present defendant in the Colonial Court of *Sierra Leone*, and there recovered judgment against him.

The broad question, therefore, is, whether this can be considered as a plea of judgment recovered, so as to deprive the plaintiff of his right of action in our Courts, or whether it is to be looked upon in the light of a mere contract between the parties. It is admitted, that there is no case to shew that a judgment, obtained in a Vice-admiralty Court abroad, is as valid as a judgment obtained here. In the case of a judgment here, the party who obtains it has a remedy of a higher nature than by suing upon his original cause of action; he may issue execution; and it would encourage needless litigation if a party, thus situated, were allowed to sue again upon his original cause of action. His remedy by action is merged in that higher remedy. Now, a

(*t*) 3 Bing. 355; 11 Moo. 209; 2 C. & P. 88.

(*u*) 8 Bing. 335; 1 Moo. & Sc. 477.

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Vice-admiralty Court abroad, belonging to the crown, is not a Court of record; a judgment, therefore, obtained in such a Court, cannot be put upon a higher footing than if it had been obtained in the common law Courts of record in the colonies; but the only mode of obtaining execution on such a judgment is by a new action, in which the judgment would be evidence; and that marks the leading distinction between a foreign judgment and a judgment obtained here. Formerly, doubts were entertained whether or not such a judgment was conclusive; and the question was a good deal discussed by Lord *C. J. Eyre*, in *Philips* v. *Hunter* (*v*); but the ground I take is this, if foreign judgment does not alter the nature of the parties' rights, why should the plaintiff be deprived of his right of resorting to his original cause of action. He has the option to do so, or to bring *assumpsit* on the foreign judgment. This was the opinion of *Bayley*, J., in *Hall* v. *Odber*, who, in giving judgment, says, "This, being only a foreign judgment, did not extinguish or merge the plaintiff's simple contract debt, which can only be done by converting it into a debt of a higher nature: it is only evidence of the debt." In that case, an action had been brought by the plaintiff in a foreign Court, and he obtained a judgment with a stay of execution for six months, and it was held that the plaintiff might still sue the defendant in this country upon the original cause of action, and use the judgment in the foreign Court as evidence in his favour, which would be quite inconsistent with the supposition that the original cause of action was extinguished between the parties.

These, therefore, are the general grounds upon which this case stands; but let us look further to the state of the record. The plaintiff, in his replication, shews matter by which he seeks to avoid the effect of the plea, and to shew that the foreign judgment is inoperative. For, supposing that the alteration has been made as suggested by the Court (which is the most favourable way of looking at the case for the defendant), the effect of the replication is, that the defendant was out of the jurisdiction of the Court at the time of the commencement of the suit down to the period of its termination, and that there was no agent, or any other person, on his behalf, on whom the process of the Court could be served; and this allegation is not answered by shewing the existence of any law in the colony by which, under such a state of facts, a judgment, obtained against a party, would be good and valid there. What then would be the condition of the plaintiff if we were to hold that he was ousted of his right to sue upon the original cause of action? If he sued upon the judgment, he would be turned round and told that he ought to sue upon the original cause of action. For these reasons, and upon the authority of *Plummer and Woodburne*, I think, upon the fifth plea, there must be judgment for the plaintiff.

VAUGHAN, J.—I am of the same opinion. I consider that Lord *Ellenborough's* judgment, in *Hall* v. *Odber*, is decisive in favour of the plaintiff.

BOSANQUET, J.—I am of the same opinion. In this case, to a count in trover, the defendant has pleaded a judgment, obtained by the plaintiff against him in a foreign Court, as a bar, and it is argued, by that judgment, the nature of the cause of action was changed. In the first place, the Vice-admiralty

(*v*) 2 H. Bl. 402, 409.

Court is not a Court of record; it has been stated, indeed, in the course of the argument, that we must assume it to be so, as it is so alleged in the plea; but, in fact, there is no such allegation; there is merely the common *formula* of *prout patet per recordum;* but this cannot be taken to amount to an averment that the Court is one of record; and I think we must understand that it is not so; then how is the original cause of action changed? It is admitted, that a judgment in a foreign Court may be the ground of an action of *assumpsit* here; but that admission assumes that such a judgment amounts merely to an agreement, and not to a debt of a higher nature. Now, this is an action of *tort*, in which the plaintiff claims damages, and to such an action, an agreement, that the damages should amount to a certain sum, cannot be pleaded in bar; that is, in effect, the present case. The judgment can only be used as evidence of the amount of damages; such was the opinion of the Court in *Hall* v. *Odber;* at most, it may amount to a plea of accord, but without satisfaction; then the replication shews that the party, against whom the judgment was obtained, was out of the jurisdiction of the Court when the action was commenced, and continued so down to the period of its termination; and there is nothing upon the record to shew that there is any law in the colony by which an absentee may be sued to judgment.

ERSKINE, J.—Taking the distinction laid down by Lord C. J. *Eyre*, in *Philips* v. *Hunter*, to be correct, I think that this plea is bad; at most, it amounts to an agreement by which the parties have settled the amount of damages sustained by the plaintiff. It appears to me, that there is neither authority or principle for saying that a foreign judgment alters the nature of a party's claim. I also agree upon the other point, that it is not sufficiently shewn that a judgment, obtained as this appears to have been, was, by the law of the colonies, binding on the parties.

Judgment for the plaintiff, on the fifth plea.

CURRIE *v.* ALMOND.

Jan. 26.

ACTION for false imprisonment. The defendant proposed to plead four pleas of justification; *first*, that the acceptance to a bill of exchange, which the defendant had discounted, was forged by the plaintiff; *second*, that it was forged by some person unknown, and was knowingly uttered by the plaintiff; *third*, that the defendant had reasonable cause to suspect that it was forged by the plaintiff; and *fourth*, that the plaintiff had obtained money from the defendant on false pretences. *Parke*, J., at chambers, refused to allow the defendant to plead more than two of these pleas; whereupon

Jervis, Q. C., had obtained a rule *nisi* for leave to plead them all.

1. Where a defence consists of facts which may lead to different legal conclusions, a defendant will be allowed to plead several pleas, stating different views of these facts.

2. To an action for false imprisonment, defendant was allowed to plead (1) that he had discounted a bill, which was forged by plaintiff; (2) that it was forged by some person unknown, and knowingly uttered by plaintiff; (3) that defendant had reasonable cause to believe plaintiff had forged it; and (4) that plaintiff had obtained money from defendant on false pretences.

3. Upon a motion to plead several matters, the Court will not decide whether a proposed plea is bad.

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J. Henderson shewed cause, and contended that the pleas were in violation of *R.* 5 *Hil.* 4 *W.* 4, as they were founded on one and the same principal matter (the defence being reasonable and probable cause) and varied in statement and circumstances only: the fourth plea, as proposed, would be bad.

Jervis and *Roberts, contrà*, were stopped by the Court.

TINDAL, C. J.—It does not appear to me that this case falls within the rule in question. It is true that different pleas, containing the same facts and circumstances with only a difference of statement, will not be allowed; but I think, when the same facts may lead to different legal conclusions, that a plaintiff cannot be prejudiced by a defendant stating his different views of those facts in separate pleas.

BONSANQUET, J.—In this case the first and second pleas state totally different felonies; and the third and fourth set up quite different grounds of justification. Whether or not the last is bad, we cannot decide upon motion.

The other judges concurred.

Rule absolute.

Jan. 26.

Ex parte ANN SHIRLEY.

The Court of *C. P.* has authority, under sec. 91 of 3 & 4 W. 4, c. 74, to authorize a *feme covert* to dispose of her *copyhold* property without the concurrence of her husband, residing abroad, notwithstanding the provision in sec. 77.

WHATELY applied for an order of the Court, to dispense with the concurrence of the husband in the conveyance of copyhold property by a married woman, under 3 & 4 *W.* 4, c. 74, s. 77 & 91 (*a*). It appeared that the marriage took place in 1807. In 1817, the husband became insolvent, and went to *America*, and had not returned since. The lady's father, by will, bearing date *November*, 1825, devised the property in question to her sole and separate use. A deponent swore, that in 1833, he saw the husband at *Philadelphia*, where he was living with a woman, who passed as his wife. It was submitted, that the words of the 91st section of the Act, were extensive enough to include such a case as the present; the only difficulty arose from the proviso in the 77th section; but though doubtlessly the husband and wife might surrender into the hands of the lord, yet, as he was abroad and there was no means of procuring his attendance, the Court would probably grant the application.

(*a*) See *ante*, 373, n. (*a*). Sec. 77, after enacting that no disposition of landed property by a married woman shall be valid, unless made with her husband's concurrence, or unless the deed be acknowledged by her as thereinafter mentioned, adds a proviso, "that this Act shall not extend to lands held by copy of Court roll of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could, before the passing of this Act, have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel."

TINDAL, C. J.—There certainly is a difficulty arising from the words of the 77th section; but we think that section and the 91st must be taken together, and that we may therefore make the order prayed for, though it does relate to copyhold property.

Order granted.

WILLIAMS *v.* DAVIS.

Jan. 28.

In a country cause, where issue is joined in an issuable Term, but no notice of trial is given, two Assizes must intervene before the defendant is entitled to judgment as in case of a nonsuit.

Therefore where issue was joined in *Trinity Term*, and no notice of trial given, a motion for such judgment in *Hilary Term* following:—*Held*, too early.

IN a country cause, in which issue was joined in *Trinity Term* last, but no notice of trial was given;

Barstow this term had obtained a rule *nisi* for judgment, as in case of a nonsuit.

Clarkson now shewed cause.—The defendant comes too early. Issue having been joined in an issuable Term, two whole Terms should have elapsed before the defendant was entitled to make this application. He cited *Taylor* v. *Robinson* (*a*), *Smith* v. *Miller* (*b*), *Apperley* v. *Morse* (*c*), *Evans* v. *Barnard* (*d*).

Barstow, in support of the rule.—The complaint here is, that the cause being ready for trial at the summer assizes, the plaintiff neglected to proceed to trial, and a whole Term has since elapsed; under the old practice, it was sufficient to take one step in a term; but under the new practice, a plaintiff is bound upon giving issue in an issuable Term, to give notice of trial at the next assizes. In *Harrison* v. *Williams* (*e*), it was so decided; but the authorities are certainly conflicting.

TINDAL, C. J.—It is a clear and intelligible rule, that in a country cause, where issue is joined in an issuable Term, and no notice of trial is given, two assizes must intervene, before the defendant can obtain judgment as in case of a nonsuit. It is difficult perhaps to get at a principle in cases relating to points of practice; but even the case last cited seems to establish the rule I have just mentioned. The present rule therefore must be discharged.

VAUGHAN, J.—I am of the same opinion. A party is not bound to take more than one step in a Term; and therefore there has been no default here.

The other judges concurring;

Rule discharged, the costs to be costs in the cause.

(*a*) 2 H. & W. 304; 5 D. P. C. 518.
(*b*) 3 Mee. & W. 60; 6 D. P. C. 154.
(*c*) 1 Will. Woll. & Hodg. 171; 6 D. P. C. 505.
(*d*) 1 Horn & Hurls. 4; 3 Mee. & W. 276; 6 D. P. C. 367.
(*e*) 1 Will. Woll. & Hodg. 290; 6 D. P. C. 772.

Common Pleas.

Jan. 28.

A fine levied at the *Cardigan* Great Session for 1830, ordered to be amended by indorsing the proclamations, it being shewn that two proclamations had been, in fact, made, and that it was the practice to make them all in conformity with 11 G. 4, & 1 W. 4, c. 70, s. 28.

EVANS, demandant, DAVIES and WIFE, deforciants.

EVANS, in last *Michaelmas Term*, had obtained a rule *nisi* in this case to amend the fine levied at the *Cardigan* Court of Great Sessions, in 1830, by indorsing the proclamations thereon. He cited *Lloyd* v. *Nicholas* (*a*).

The following facts appeared from the affidavits:—That the deforciants had acknowledged the fine in question before the judge of the Court of Great Sessions at *Cardigan*, in *August*, 1830, as was shewn by the caption; that the writ of covenant of the fine, was returned at the *Cardigan Autumn* Great Sessions, 1830, duly compounded, and that an entry of the fact was made by the compounder; that all the records had been in the custody of Mr. *Jones*, the deputy prothonotary of the Court, who made all the entries relating to them; that for many years previous to 1830, and during that year, the proclamations on the fines were omitted to be indorsed thereon; that at the *Autumn* Great Sessions, held at *Cardigan*, for 1830, the fine in question was annexed to the fines then levied; that the chirograph of the fine was neither engrossed or sent to the demandant; that in 1830, (the abolition of the *Welsh* judicature) Mr. *Jones*, was appointed clerk of assize, and so continued till his death in 1836; that it was his duty to indorse the proclamations on fines, and that the records remained in his custody till his death. The criers of the Court at the *Autumn* Great Sessions of 1830, and the *Autumn* Assizes of 1831, deposed, that upon those occasions the roll of the fines was, after notice given, read out by the clerk, in compliance with his duty, and according to the practice of the Court; which practice was, to make the first proclamation at the Sessions at which the fine was levied; and the two subsequent ones at the two succeeding Sessions Mr. *Jones's* clerk deposed, that it was the practice to proclaim all fines, whether they required proclamation or not; that the foot or conclusion of the fine was seldom made; and that upon office copies being required, the proclamations for any particular fine were taken from a footing which might be annexed to another fine on the same roll. Mr. *Jones* and the crier who attended at the *Cardigan* Spring Assizes in 1831 being both dead, no affidavit could be made as to the proclamation at those assizes.

E. V. Williams now shewed cause, and contended that as there was no affidavit of any proclamation having been made at the Assizes of 1831; the Court could not amend, as there was nothing to amend by; the applicant might have produced the compounder's books, or an affidavit from the cursitor who was now alive, or the associate, who had died since the present application was made, to shew that such a proclamation was made, if such was the fact.

Evans, in support of the rule contended that, as by the 28th section of the Statute, 11 *Geo.* 4, and 1 *Will.* 4, c. 70 (*b*), proclamations were required to

(*a*) *Ante*, 237; 4 N. C. 633; 6 Sc. 355.

(*b*) Enacting, that "upon all fines which are now, or before the commencement of this Act, shall be duly acknowledged in *Chester* or *Wales*, proclamation may be made at the successive Assizes to be holden under his Majesty's

be made, and as the affidavit of the clerk of the deputy prothonotary shewed that it was the practice to make them, the Court would presume that the officer had done his duty. He also referred to *Evans*, dem. *Griffiths*, tenant, *Jones*, vouchee (*c*).

TINDAL, C. J.—I think that the part of the affidavits to which our attention has just been called, and the section of the Act of Parliament, relieve the Court from every difficulty. There is no doubt that the proclamations were duly made on two occasions; the doubt being only as to one of the three occasions; but when we find the uniform practice to have been to make proclamations on all fines, and that the Clerk of the Assizes has the rolls in his possession on which the fines were entered; I think we must assume that he did his duty; and that we shall only carry out the principle of *Lloyd* v. *Nicholas*, by making this

Rule absolute.

commission within the county of *Chester*, and principality of *Wales*, before any judge of such Assizes during the continuance of such his commission, in the same manner and form, and with the same force and effect, as if the same had been proclaimed before the justices of *Chester* and *Wales*, or any of them."

(*c*) 9 Bing. 311; 2 Mo. & S. 383.

MADISON *v.* BACON.

Jan. 30.

ASSUMPSIT for money had and received, brought to recover the sum of 1000*l.*, alleged to have been borrowed on the credit of the defendant. A verdict having been found for the defendant, a rule *nisi* was obtained for a new trial, on the ground of the verdict being against evidence. This rule was afterwards made absolute on payment of costs. The defendant's costs were taxed on the 24th *November*, when the Master disallowed the costs of the journies and attendance of the defendant's attorney from *Bath*; a brief to second counsel and the fees thereon, and also the consultation fees; on the ground that there were no proofs set out on the briefs.

In an action to recover 1,000*l.*, involving the character of the parties, a new trial having been granted to the plaintiff on payment of costs, and the Master having disallowed two briefs for counsel, and the attendance of the attorney in *London*, upon the ground that there were no witnesses in the defendant's brief, the Court directed a review of the taxation.

Talfourd, Serjt., on a former day in this Term, obtained a rule *nisi*, for a review of the taxation.

Wilde, Serjt., and *Ogle* now shewed cause, and contended that the Master had the power of allowing or disallowing the expences incurred by the defendant's attorney attending the trial; and that the fees on the second brief and the consultations were likewise properly disallowed. The attorney ought to have made an affidavit of increase, stating that he had no other business in town whatever, and that he attended expressly on this cause and no other. After the delay which had occurred the Court would not direct the Master to review his taxation.

Talfourd, Serjt., in support of the rule.—The delay ought not to prejudice the defendant. The action was brought to recover 1000*l.*, and

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involved also a serious imputation, on the character of the parties. It was a case of great importance and required the assistance of two counsel, and it sufficiently appeared that the attorney had no other business in town; indeed it is not denied on the other side that such was the fact: it would be an act of great injustice to deprive the defendant of the assistance of his attorney, whose knowledge of the case was necessary for the safe conduct of the suit.

TINDAL, C. J.—I think under all the circumstances of the case, it being one of great importance, that the Master should review his taxation.

The other judges concurring.

Rule absolute.

Jan. 30.

ADEANE *v.* MORTLOCK.

The plaintiff enjoyed a prescriptive right of way over a piece of open land (called *W. F.*) to certain sluices erected on a water-course there. By an Inclosure Act, *W. F.* was allotted to the defendant, and certain other lands to the plaintiff, and all ways over *W. F.* were to be extinguished as soon as the defendant had made another public road, provided that nothing contained in the Act was to deprive the plaintiff of the right of ingress, &c., to the said water-course: the defendant made the new road, and set out another way for the plaintiff:—*Held*, that his old right of way was not extinguished.

In an action by a reversioner for a nuisance, a tenant who is injured by the nuisance is a competent witness:

Therefore, under the above circumstances, a tenant of the plaintiff's, whose land was irrigated from the water-course, is a good witness.

CASE, for obstructing a right of way. The third count stated, that the plaintiff was possessed of certain land, in the parish of *Little Abingdon*, in the county of *Cambridge*, near a certain stream or water-course there, communicating with a certain stream or river, and during all the time, &c., a portion of the water of the said river of right ran and flowed, and still of right ought to run and flow, out of the said river unto and into the said water-course and over and along a certain land of the defendant, and under a certain piece of road there, and into the said land of the plaintiff, and that during all that time, there were two sluices or staunches, on the defendant's land, and that the plaintiff had the right of repairing and opening and shutting them, and of scouring a portion of the water-course, and by reason thereof the plaintiff was entitled to a foot-way from his land over the road unto and over certain land of defendant's to the said sluices, and to the said portion of the water-course, being within the defendant's land, and back again, but that the defendant had obstructed and stopped the said foot-way.

The fourth count stated the possession of the land to be in certain tenants of the plaintiff, and set out the right of foot-way and obstruction, as in the former count, laying the damage to the plaintiff's reversionary interest.

Pleas: first, Not Guilty; *second* and *third*, traversing the right of way, as laid in the third and fourth counts.

At the trial, before *Parke*, B., at the last Spring Assizes, for *Cambridgeshire*, it appeared that the plaintiff's estate was separated from that of the defendant by a turnpike-road; that from time immemorial the water-course in question had flowed from the defendant's land across a certain field, called *West Field*, (which, previously to 1804, was uninclosed,) and crossed the road, and then entered the plaintiff's land; that the sluices in question were also situated in *West Field*; that up to 1804, the plaintiff's servants had been in the habit of entering *West Field* at a particular spot under some bars or rails adjoining to the turnpike-road, and of crossing by a path up to the sluices,

for the purpose of repairing or opening or shutting them, and back again; and that there were also other ways used by the public across the field; that by an Inclosure Act, passed in 1804, *West Field* was allotted to the defendant, and certain other lands to the plaintiff. By sec. 15, of the Act, the commissioners were authorized to set out such public and private roads and ways across the lands to be inclosed as they should think proper; also to stop up or alter any old roads or ways; and that after the said roads or ways should be so set out or altered, no person should use the ancient roads or ways: by sec. 17, the commissioners were authorized to set out a public carriage-road across *West Field*, at the expence of the defendant: by sec. 18, all carriage-roads, bridle-roads and foot-ways over or across *West Field* were to be extinguished from the time the public road, to be made at the expence of the defendant, should have been formed and put into sufficient repair for the passage of carriages, &c., "provided that nothing in the Act contained should extend to deprive the plaintiff, his heirs, &c., and servants, with or without horses, carts and carriages, of *the right of ingress, egress and regress* at all seasonable times, &c., *to and from the ancient cut or water-course* (describing it) and every part thereof, for the purpose of rebuilding, repairing, opening or shutting the sluices or staunches erected upon the said water-course, for the purpose of cleaning and scouring out the same, or for any reasonable purpose whatsoever relating to the said water-course." That the defendant inclosed *West Field* pursuant to the Act of Parliament, and put a fence along the side of the turnpike-road, and that he also made a carriage-way, as provided for by the Act, which had been subsequently used by the plaintiff and his family; that the defendant set out a new way for the plaintiff to the water-course, but which was not so direct as the old one, and the plaintiff's servants were in the habit of climbing over the fence, by means of steps placed against the same, for the purpose of using the old way; but that, in 1834, the defendant removed the steps, and placed spikes in the fence, which was the grievance complained of.

One of the witnesses, called on the behalf of the plaintiff, was a tenant of his, who occupied a meadow that was irrigated by the water-course in question. He was objected to, as being interested in the event of the suit, on the authority of *Doe*, dem. *Lord Teynham* v. *Tyler* (*a*); but the judge admitted him as a witness after having his name indorsed on the record pursuant to the Stat. 3 & 4 *W.* 4, c. 42, s. 26.

The judge directed the jury that the Inclosure Act did not affect the plaintiff's right of way, which appeared to him was expressly reserved by the proviso in the 18th sec., and the jury thereupon found a verdict for the plaintiff.

Kelly, Q. C., had obtained a rule *nisi* to set it aside, on the ground of misdirection, and of the improper reception of evidence.

B. Andrews, Q. C., and *Byles* now shewed cause.—First, the direction of the judge was correct. There is no dispute, as to the existence of the particular right of way before the Inclosure Act; nor that the plaintiff is entitled to some right of way since that Act; the only question is, whether or

(*a*) 6 Bing. 390; 4 M. & P. 29.

not he is entitled to the ancient way. Now the 18th sec. expressly reserves to him "*The* right of *ingress, egress and regress,*" which cannot mean any thing except the right which he then enjoyed. The Act must be considered in the nature of a contract between the parties; and as the defendant received an advantage under it, it ought to be construed strictly against him, *Scales* v. *Pickering* (*b*).

Secondly, the witness was clearly admissible; that point was expressly decided in *Doddington* v. *Hudson* (*c*).

Wilde, Serjt., *Kelly*, and *Gunning* in support of the rule.—First, looking at the whole Act, it clearly was not the intention of the parties, that this particular right of way should be reserved to the plaintiff. All that was intended was that he should have *convenient access* to the sluices, and that has been provided for by the new way; and as he takes an advantage under the Act as well as the defendant, there is no reason for construing it strictly against the latter.

Secondly, the witness had a direct interest in the suit, inasmuch as the beneficial occupation of his land depended upon the plaintiff's right of access to the sluices.

TINDAL, C. J.—I think this rule must be discharged. At the trial there was only one right of way in dispute, namely, that which had been enjoyed by the plaintiff over *West Field*, before it was inclosed under the authority of the Act of Parliament. I think that it was the intention of that Act merely to extinguish the public roads and ways across *West Field*, but it appears by the evidence that the plaintiff had something more, namely, a right to diverge from the path in respect of a private right for the purpose of having access to the water-course. The Act of Parliament which extinguished all public ways, except one which was to be made by the defendant, expressly reserved to the plaintiff "the right of ingress, egress and regress, to and from the water-course;" and this, in my opinion, points at the possession of a right which he already possessed, as contradistinguished from the right enjoyed by the rest of the public, or in other words, it pointed out the particular mode of getting in and out of *West Field*, which he used at the time the act came into operation. As to the fact of the paling having been put up by the defendant, we may readily suppose that the plaintiff would acquiesce in any thing being put up to keep out the public, so long as his servants had access to the water-course by the old way. There are certainly some points of difficulty in the evidence as to the amount of obstruction on one side and acquiescence on the other, but I think this part of the case was fairly left to the jury.

The second question is, whether, in an action brought by a reversioner against a stranger for an injury to his reversion, a tenant of the plaintiff, who is injured by the grievance complained of, is a competent witness. Undoubtedly he has a very great bias on his mind in giving evidence to put a stop to the nuisance by which he suffers, but this merely affects his credit, and not his competency.

VAUGHAN, J.—If I thought this case had miscarried by reason of the direc-

(*b*) 4 Bing. 448; 1 Mo. & P. 195. (*c*) 1 Bing. 257; 8 Moo. 163.

tion of the learned judge at the trial, I should be anxious that it should be submitted to another jury, but I think the words of the Act of Parliament are plain and unequivocal: and fully bear out the learned judge's direction, the very word *deprive* used in the Act points out something certain and definite which the plaintiff had previously enjoyed. Upon the other point *Doddington* v. *Hudson* is an express authority, and the principle established in *Bent* v. *Baker* (*d*), also shews that the tenant was a competent witness.

BOSANQUET, J.—The first question in this case arises upon the construction of this private Act of Parliament, by the 18th sec. of which it is provided that nothing therein contained shall extend to deprive the plaintiff of the right of way to the water-course. Now it is not disputed that the way in question has been obstructed, nor is it contended that the plaintiff has any right to use it for general purposes, the only question is whether he has a right to use the same way which he enjoyed before the passing of the Act, and for the same purposes. It is urged indeed on the part of the defendant, that a convenient access has been substituted by him, and that that is sufficient under the Act; but looking at the Act as a contract, we cannot suppose that parties would leave their rights in so vague and indefinite a state. The Act says that the plaintiff shall not be *deprived* of the right of *ingress*, *egress* and *regress*. Now *to deprive* means to take away something which the party had before; and I think therefore that it was the intention of the parties to reserve to the plaintiff the right of *ingress* and *regress*, in the same line which he had used before the Act was passed. As to the other point the only case in which a witness can now be rejected, on the ground of interest in the suit, is where he derives benefit, or incurs responsibility from the direct result of the suit; a benefit or responsibility which may be enforced by law, without resorting to the verdict or judgment. Such cases are rare, and at all events this is not one of them.

ERSKINE, J.—I am of the same opinion. The plaintiff's right of access to the sluices is not disputed; the only question is whether he is entitled to approach them by a particular line. At the time the Act passed the plaintiff had, as it were, two rights of way over *West Field*, the one over the public ways in common with the rest of the public, the other a private way to the water-course; the former was extinguished by the Act, but the latter was expressly reserved to him. Upon the other point I will only say I fully concur with the rest of the Court.

Rule discharged.

(*d*) 3 T. R. 27.

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Jan. 31.

If a plea professes to answer the whole declaration, and in truth only answer part, the plaintiff cannot sign judgment for the part unanswered, but can only demur: Therefore, where, to a declaration in debt for 150*l.*, containing three counts of 50*l.* each, the defendant pleaded, as to the whole action, payment of 50*l.*, and the plaintiff, in his replication, signed judgment for 100*l.*: —*Held*, the judgment was irregular.

Wood and another *v.* Farr.

DEBT for 150*l.* The declaration contained three counts, for 50*l.* each; *first*, for work and labour; *second*, for goods sold; and *third*, on an account stated. *Plea, actionem non*, because the defendant, before commencement of suit, had paid, and the plaintiffs had received, divers sums of money, amounting to 50*l.*, in respect of the monies due and owing from the defendant to the plaintiff.

Replication, traversing the payment and receipt of the 50*l.*, *modo et formâ*, and concluding with taking judgment by *nil dicit* for the sum of 100*l.*

Chandless obtained a rule *nisi* to set aside the judgment as irregular; he cited *Vere* v. *Goldsborough* (*a*).

Wilde, Serjeant, now shewed cause.—The plaintiffs may either demur or sign judgment. They are not bound to demur, but may give the defendant the benefit of the plea as an answer to part of the cause of action. There is no affidavit of merits. [*Tindal*, C. J.—The point seems to be, whether the plea does not begin as an answer to the whole action, and if so, as the plea in fact contains only an answer to part, the plaintiff ought to demur. His lordship referred to *Weeks* v. *Peach* (*b*), and *Truscott* v. *Carpenter* (*c*).]

Chandless in support of the rule.—The plea begins as an answer to the whole declaration, and therefore it must be so construed, unless the defendant demurs; *Putney* v. *Swann* (*d*), *Worley* v. *Harrison* (*e*); the plaintiff could not have signed judgment as for want of a plea. (He was stopped by the Court.)

Tindal, C. J.—We cannot distinguish this case from those in *Salkeld* and Lord *Raymond*; in the former this distinction is taken "if a plea begin with an answer to the whole, but in truth the matter pleaded is only an answer to part, the whole plea is naught, and the plaintiff may demur; but if a plea begin only as an answer to part, and is in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by *nil dicit*." The plaintiffs here were not at liberty therefore to sign judgment, as the plea professes to be an answer to the whole action; but as it appears to have been pleaded for the purpose of inviting a demurrer, and there are no merits sworn to, we shall not give any costs, but they will be costs in the cause.

Rule absolute accordingly.

(*a*) 1 N. C. 353; 1 Scott, 265.
(*b*) Salk. 179.
(*c*) Ld. R. 230.
(*d*) 2 Gale, 216; 2 M. & W. 72; 5 D. P. C. 296.
(*e*) 1 H. & W. 426; 3 A. & E. 669; 5 N. & M. 173.

GIBSON and others (Assignees of MALLANDAINE, a Bankrupt) v. The EAST INDIA COMPANY.

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A grant of a pension by the *E. I. Company* to a retired military officer is not a contract made by them in their trading character, the *Company* being a corporation established partly for the purposes of trade, and partly for the purposes of government; and, consequently, does not fall within the rule, that a trading company may make parol contracts in matters relating to their trade:

Therefore the grant of such a pension, not being under seal, gives no right of action to the officer; nor, consequently, in case of his bankruptcy, to his assignees.

THE following case was submitted for the opinion of this Court, pursuant to Statute 3 & 4 *Will.* 4, c. 42, s. 25, under the order of *Bosanquet*, J.

The plaintiffs are assignees of the estate and effects of *John Mallandaine*, a bankrupt, and this action is brought to recover the sum of 182*l.* 10*s.*, being the half-yearly payment, claimed to be due at *Christmas*, 1836, of a pension payable to the bankrupt by the *East India Company*, in consequence of his having served in *India*, as a military officer, the required period to entitle him to a pension equal to his pay as a Lieutenant Colonel.

The declaration states, that in consideration of certain services rendered to the defendants by the said *J. Mallandaine*, the defendants promised to pay him a yearly sum of 365*l.*, by two half-yearly payments, and the breach is, that they have refused to pay to the plaintiffs, his assignees, a half-yearly payment, which became due after his bankruptcy. The defendants have pleaded, that they did not promise as alleged.

By one of their regular instructions called military letters, addressed by the Court of directors of the *East India Company*, to their officers and servants at *Madras*, in the year 1792, it is ordered and declared, that every officer after twenty-five years' service in *India*, three years for one furlough being included, shall be allowed to retire with the pay of the rank to which he may have attained. This instruction or letter was published by the directors, as one of the regulations of the *East India Company's* service, many years before the bankrupt entered their army, and has continued in force, and been acted upon ever since.

The bankrupt entered the service of the *East India Company*, some time in the year 1808, and previously to the year 1834 had attained the rank of Lieutenant Colonel in the *Madras* army (*a*), and performed the requisite

(*a*) The Court, during the progress of the argument, having intimated a desire to see the form of commission, or appointment, of a Lieutenant Colonel, the following documents were subsequently handed in:—

"We, the governor and president, and council of and for all the forces and affairs of the Honourable United Company of Merchants of *England*, trading to the *East Indies*, within the residency of *Bombay* and its dependencies; to all to whom these presents shall come greeting.

"By virtue of a power given us by the Honourable the Court of Directors of the said United Company, derived unto them from our Sovereign Lord King *George* the Fourth, and his royal predecessors, reposing especial trust and confidence in your courage, fidelity and circumspection, do, by these presents, constitute and appoint you, *J. S.*, Esq., to be a Lieutenant Colonel Commandant of Infantry, under the presidency of *Bombay*, and to take rank on and from the , 18 . You are, therefore, to take upon you the said charge and command, and carefully and diligently to discharge the duty of a Lieutenant Colonel Commandant as aforesaid, by doing and performing all things thereunto belonging. And we do hereby command all inferior officers and soldiers to obey you as Lieutenant Colonel Commandant, you following all such orders as shall be given you by us, or the president and council for the time being; the Commander in Chief, or any other your superior officers, according to the rules and discipline of war; or failing therein, these presents are to be vacated and annulled by us, or the president and council for the time being, sealed with the seal of the aforesaid

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service to entitle him to his retirement and pension within the meaning of the said instruction, and accordingly he did retire in *November*, 1834, and on the 24th day of *November*, 1834, according to the usual course, the Court of directors upon his application resolved, "that Lieutenant Colonel *John Mallandaine*, of the *Madras* establishment, be permitted to retire from the service on the full pay of Lieutenant Colonel, namely, 1*l.* a day, the same to commence from the date of such application." The pension was paid to the said *John Mallandaine*, by half-yearly payments, until his bankruptcy which took place on the 29th day of October, 1836.

The said sum of 182*l.* 10*s.* has been paid by the defendants to the said *John Mallandaine*, since he became bankrupt, and after the defendants had notice of his said bankruptcy.

It is agreed, that the Court may draw such inferences from the above facts as may appear reasonable to result from them.

If in the opinion of the Court the plaintiffs' are entitled to recover, the judgment is to be entered for the plaintiffs by confession, for 182*l.* 10*s.*; if they shall be of a contrary opinion, the judgment of nonsuit is to be entered.

The case was argued in *Michaelmas Term*, by

Wilde, Serjeant, for the plaintiffs.—The annual payments become due to the bankrupt in pursuance of a contract; and the legal right to such payments having vested in him, it passed to his assignees upon his bankruptcy.

It will be argued on the other side, that inasmuch as the *East India Company* is a corporation, and the grant of the pension was not by deed, no such

Honourable Company, and given under our hands in *Bombay Castle* this day of , in the year of the reign of his present Majesty, and in the year of our Lord, one thousand eight hundred and

"By order of the Honourable Major General, Sir *J. M.*, G. C. B., governor, and president, and council, &c., &c., *Bombay*.

(Signed) *A. B.* Chief Secretary to Government (*L. S.*)

(Signed) *J. M.* *S. B.* *J. R.* *H. N.*"

"The Honourable Sir *E. P.*, Knight Grand Cross of the most Honourable Order of the Bath, &c., General of his Majesty's forces, Commander in Chief of all the King's and Company's forces in the *East Indies*, &c., &c.

"To *J. S.*, Esq., Lieutenant Colonel in the service of the United Company of Merchants, trading to the *East Indies*.

"By virtue of the power and authority in me vested by his Majesty, and reposing especial trust and confidence in your loyalty, courage and good conduct, I do hereby constitute and appoint you, the said *J. S.*, Esq., to hold the rank of Lieutenant Colonel in the King's army in the *East Indies* only, and to take rank as such from the day of 18 . But as this commission is granted to you in virtue of the rank which you bear in the service of the Honourable *East India* Company, it is to have force and effect no longer than you shall remain in the said Company's service, unless you shall be transferred with similar rank into the immediate service of his Majesty. You are, therefore, carefully and diligently to discharge the duty of Lieutenant Colonel, by doing and performing all and all manner of things thereunto belonging. And I do hereby command all officers and soldiers, whom it may concern, to acknowledge and obey you as a Lieutenant Colonel in the King's army in the *East Indies* only as aforesaid. And you are to observe and follow such orders and directions, from time to time, as you shall receive from his Majesty, or any your superior officer, according to the rules and discipline of war, and in pursuance of the trust hereby reposed in you.

"Given under my hand and seal at *Fort William*, in *Bengal*, this day of *October*, in the year of our Lord, 18 , and in the year of his Majesty's reign.

"By his Excellency's command.

(Signed) *G. G.* (Signed) *E. P.* (L. S.) *F. C.*, Sec."

interest vested in the bankrupt as would pass to his assignees; but this is not a case in which a deed is required, the bankrupt is now a *quasi* stranger to the company; they have no further claim upon his services, his military character has wholly ceased; the general resolution of the company was passed before the bankrupt entered their service, and a contract founded on such resolution, is impliedly sanctioned by Statute 33 *Geo.* 3, c. 52, s. 125, which enacts that no resolution of the Company shall be *available in law* for new pensions, beyond 200*l.* a year, unless appointed and confirmed by the Board of Controul; it must be taken therefore, that a pension so approved, would be available in law, and it would not be so, if the party, to whom it was given, could not enforce its recovery. The rule formerly was, that a corporation could not contract except under seal; but that rule has in later times been much relaxed; the late case of *Beverley* v. *The Lincoln Gas Light Company* (*b*), (in conformity with the previous decision of *The Mayor of Stafford* v. *Till*) (*c*); has established that a corporation may be sued on an executed parol contract, and the subsequent case of *Church* v. *The Imperial Gas Light Company* (*d*), carries this doctrine still further, and shews there is no distinction between executory and executed contracts in this respect; thereby overruling to a certain extent the case of *The East London Waterworks Company* v. *Bailey* (*e*).

Assuming then, that the Company might, in some cases, contract without deed, the contract in question is of that nature; for it is not strictly speaking an annuity (which must be granted under seal), but it is in effect a contract for wages, or for a remuneration, in respect of past services; and a contract for an annual payment, founded on such a consideration, may be made by parol; *Moore* v. *Lewis* (*f*), *Binnington* v. *Wallis* (*g*), *Gibson* v. *Dickie* (*h*). The bankrupt's pension is not a gratuitous gift to him, it is a contract founded upon the resolutions and orders of the company, upon which the bankrupt could have sued the company to recover the arrears of his pension, and consequently, his right of action has passed to his assignees; and upon that the whole question turns.

But it may be urged, that this case is analogous to the half-pay of a military officer, which, in the case of his bankruptcy, will not pass to his assignees; but there is no such analogy, for the half-pay is revocable, and this pension is not; and moreover the half-pay is given by the public to the officer, not as a remuneration for *past*, but as a retainer for *future* services, for which he can be called upon at any time; but here, even supposing the company to stand in the same situation as the government, all connexion between them and the bankrupt has ceased; and they have not the slightest claim upon his services; the reasons of public policy therefore, which are applicable to the other case, do not apply to this.

Where the legislature has intended that certain pensions should be inalienable, they have expressly so enacted; as they have done with certain restrictions, in respect to *Chelsea* pensions, by 7 *Geo.* 4, c. 16, s. 26; *Green-*

(*b*) 1 W. W. & D. 519; 6 A. & E. 829; 2 N. & P. 283.
(*c*) 4 Bing. 75; 12 Mo. 260; see also *The Mayor of Carmarthen* v. *Lewis*, 6 C. & P. 608.
(*d*) 1 W. W. & H. 137; 6 A. & E. 846; 3 N. & P. 35.
(*e*) 4 Bing. 283; 12 Mo. 532.
(*f*) 1 Ventr. 27; Sid. 413; S. C. (nom. *Clow*, or *Alow*, or *Eyloe* v. *Moore*); 2 Keble, 488, 507.
(*g*) 4 B. & A. 650.
(*h*) 3 M. & S. 463.

wich pensions, by 10 *Geo.* 4, c. 26. s. 10; *Excise* pensions, by 7 & 8 *Geo.* 4, c. 53, s. 121; and the pension granted to the Duke of *Wellington*, by 54 *Geo.* 3, c. 101, s. 28; as was also the case with the Duke of *Marlborough's* pension (*i*); but there is no such restriction either in the former Acts relating to the Company, or in the 3 & 4 *Will.* 4, c. 85, by which the last charter was granted to the Company. By the 29th section of the *Insolvent Act* (*j*), the pay or pension of any officer in the service of his Majesty, or of the *East India Company*, being insolvent, does not pass to his assignees, though a portion thereof may be obtained by them, on application to the Court; but there is no such provision in the Bankrupt Acts.

Spankie, Serjeant, for the defendants.—The bankrupt here had entered into an arrangement with the *East India Company*, under which he was to receive from them certain sums of money; but there was no legal contract between them, which can be either enforced by him or his assignees. The pensions are awarded to officers who have been in the company's service, to enable them to retain their fitting station in society; and they are given, upon grounds of public policy, by the government of *India*, for the Company holds that character. The allowance of the pension forms no part of the original engagement; before an officer can become entitled to it, he must request permission to retire from the service, which request is taken into consideration by the Company; and then follows the resolution for allowing the pension; so that all these preliminary proceedings are necessary, in order to render the arrangement effectual.

The cases which decide that corporations may sue or be sued upon parol contracts, have no application; they were cases in which from the particular nature of the corporation, and of the dealing, it was necessary to depart from the old strict rule with regard to corporations, or rather to extend an exception to that rule; for it has always been held that a corporation might make certain minor contracts by parol, such as to employ a person in ordinary services, as a butler, cook, or bailiff; *Bac. Abr.* "Corporations" (E. 3,) (*k*), *Com. Dig.* "Franchises" (F. 13). Assuming therefore that this were in the nature of a contract between the bankrupt and the Company, it would be a contract by a corporation for the grant of an annuity, which clearly can only be granted by deed; *Co. Lit.*, 144 b. 145, *In re Locke* (*l*), (*Moore* v. *Lewis* was not the case of a corporation;) as a demise by a corporation must be by deed, *Rex* v. *Chipping Norton* (*m*). The 125th section of the 33 *Geo.* 3, c. 52, which has been referred to, does not enable the company to make a valid grant without deed, but merely superadds certain regulations, without which the company are not at liberty to make any payment; and 53 *Geo.* 3, c. 155, s. 88, is to the same effect, and there these pensions are expressly termed "gratuities (*n*)."

(*i*) See 5 An. c. 4.
(*j*) 7 G. 4, c. 57.
(*k*) Cit. 1 Ventr. 47; 3 Lev. 107; Salk. 191.
(*l*) 2 D. & R. 603.
(*m*) 5 Ea. 239.
(*n*) After reciting 33 *G.* 3, c. 52, s. 125, it is enacted, "that it shall not be lawful for the Court of Directors to charge the funds of the company with the payment of any *gratuity* to any office, civil or military, exceeding 600*l.*, unless the *grant or resolution* for that purpose shall have been sanctioned by the Court of Proprietors, and approved and confirmed by the Board of Commissioners; and that *copies of all* warrants or *instruments*, *granting any* salary, *pension or gratuity*, shall be submitted to both Houses of Parliament, within

Secondly, there is a close analogy between the allowance to a retired officer by the Company, and the half-pay of an officer in the army; in either case it is a remuneration *pro servitio impenso*, for though it is given for the better sustentation of the officer's rank, the real consideration is his past services; the same rules of public apply equally to both cases, and it is clear the half-pay of an officer, if he becomes bankrupt, will not pass to his assignees; *In re Kennedy* (*o*), *Flarty* v. *Odlum* (*p*), *Cathcart* v. *Blackwood* (*q*); nor any grant for public services, *Davis* v. *Duke of Marlborough* (*r*); and upon the same principle, the profits of an ecclesiastical benefice will not pass, *Arbuckle* v. *Cowtan* (*s*). It has been held indeed that an annuity granted to one *and his assigns, pro consilio impendendo*, may be assigned over, *Maund's* case (*t*); but that is by the express words of the grantor, upon the principle, *modus et conventio vincunt legem*.

The provision in the old Insolvent Act, which is repeated in the Imprisonment for Debt Act (*u*), shews that, in the view of the legislature, the pay of an officer in the *East India Company* was not assignable, for it is coupled with the pay of the King's Officers, which would not have passed before those Acts. There is no such provision in the Bankrupt Act; and, therefore, under a bankruptcy, the creditors can still take no portion of the half-pay of an officer, for they can only take what the bankrupt can part with.

Wilde, in reply.—It is argued that this *being an annuity*, is not valid, because not granted by deed; but it is not strictly an annuity; it is not necessary that every contract for the payment of an annual sum should be by deed, and it makes no difference whether the payment is to be made for a term of years or for life; strictly speaking, rent belongs to an interest connected with land, but in common parlance, many things are called rent, which are not so in law, but which are mere payments in gross; calling a thing by a particular name, does not make it the thing it is called; and though the pension in this instance may be called an annuity, yet it is in fact, nothing but a contract to pay an annual sum for life, in consideration of services rendered. *In re Locke* only decides that an agreement to sell an annuity, cannot be enforced in law as an annuity, even though inrolled.

The resolution of the Court of directors, is an inducement to persons to enter into the service of the company, and has been acted on ever since it has been first passed.

The next objection is, that even if this is not to be considered as an annuity, yet still being a contract by a corporation, it must be by deed; but it is clear that corporations may enter into various kinds of contracts by parol. In the present case, it cannot be contended that it is necessary that the clerks and porters of the company, or common soldiers employed in their service,

one month after such grant, if Parliament be then sitting; or if not, within one month after their then next meeting." [*Query*, is not the effect of this section to give a *quasi* legislative sanction to each grant of a pension, so as to supersede the necessity of a deed?

(*o*) 3 T. R. 683 (n.); Co. B. L. 299.

(*p*) 3 T. R. 681.

(*q*) Co. B. L. 299; see also *Barwicke* v. *Reade*, 1 H. Bl. 627; *Lidderdale* v. *Duke of Montrose*, 4 T. R. 248; *Stone* v. *Lidderdale*, 2 Anstr. 533.

(*r*) 1 Swanst. 74.

(*s*) 3 B. & P. 321.

(*t*) 7 Rep. 28, b.

(*u*) 1 & 2 Vict. c. 110, s. 56.

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should be appointed by deed; and the same principle will apply to the officers in their service. The company did not understand that a deed was necessary to the validity of the appointment of their officers, or there would have been no necessity to pass the resolution in question; that resolution must be taken as a binding contract, and the 33 *Geo.* 3, c. 52, is a legislative declaration that the funds of the company are charged thereby. There is a great distinction between a *pension* for past services, and *pay* for services which may be resumed. In *Ex parte Battine* (*v*), it was held that a pension during his Majesty's pleasure, granted by order in council for past services, as advocate of the admiralty, and charged on the navy estimates, might be appropriated under the Insolvent Act, with the consent of the lords of the Admiralty, for payment of creditors. There is no doubt that a pension annexed to a dignity is inalienable; but the argument that the pension in this case was granted to keep up the bankrupt's station as an officer, can have little weight, seeing that he has forfeited that station by entering into trade.

Cur. adv. vult.

TINDAL, C. J., now delivered judgment.—The question before us will depend, as was admitted in the course of the argument, on the single point, whether the bankrupt himself, in case no bankruptcy had intervened, could have maintained an action against the *East India Company*, for the arrears of his pension; for it is obvious, that the assignees cannot have any right of action in this case, independently of that which they derive from or through the bankrupt himself.

The general rule of law is not denied on the part of the plaintiffs to be, that no action founded on contract, can be maintained against a corporation aggregate, unless where such contract is under the seal of the corporation. Such indeed is the language of all the authorities, beginning with those collected from the *Year-books*, in *Bro. Abr.* tit. "Corporations and Capacities," down to the latest of the present day; the ground of that rule, as it is to be extracted from such authorities, being that, as a corporation is a body politic and invisible, it can only act and speak by its common seal; or, as it is said *arguendo*, in *Rex* v. *Bigg* (*w*), "the common seal is the hand and mouth of the corporation."

But on this general rule, both in ancient, and still more frequently and largely in modern times, have exceptions been grafted; so that it is now undoubted law, that in very many cases, actions are maintainable in our Courts upon contracts entered into, by or on behalf of corporations aggregate, though such contracts are not under seal. It is only necessary to allude to one class of these exceptions, determined in very early times, relating to contracts either expressly entered into by corporate bodies, or which result from acts done by them in matters of slight importance, of frequent recurrence, and of necessity for the existence and carrying on of the corporation itself; such as the employment of a butler or cook, or the appointment of a bailiff for distraining beasts damage feasant, and the like; because the case now before us cannot, upon any ground of analogy be held to fall within this class; but our attention must be more particularly directed to that larger class of ex-

(*v*) 4 B. & Ad. 690, 1 N. & M. 579.

(*w*) 3 P. Wms. 423.

cepted cases which has grown up principally in modern times, where the contract entered into is one of which the allowance is necessary for, or incidental to, the carrying into effect the very purposes and objects for which the corporation itself was originally created.

It is upon the principle and reason on which this class of exceptions is grounded, that the course of argument on the part of the plaintiffs has proceeded; and whether the contract now under consideration falls within this exception, or remains under the control of the general rule of law, is the question before us.

Now, allowing to this class of exceptions the widest range to which it has ever been carried, and taking it to have been correctly laid down in the late case of *Beverley* v. *Lincoln Gas and Coke Company*, it is this; that *when a company is instituted for the purposes of trade, such company may, in matters of frequent requirement, and of small amount, make a valid contract relating to the trade which they carry on, without affixing the common seal, although such a corporation be a corporation aggregate, without a head.* As in the case last cited, a company created by Act of Parliament for the supply of gas, may contract for gas-meters, for the purposes of their trade, without seal; and upon such contract may be held liable in an action of *assumpsit*, for goods sold and delivered. And again, a company so instituted may be liable upon a similar contract not under seal, although the contract be not executed, but executory only; as was determined in the case of *Church* v. *Imperial Gas Light Company*: and indeed the same principle, that a corporation established for the purpose of carrying on trade or manufacture may differ from other corporate bodies, as to the power of contracting in matters relating to the purposes for which the company was formed seems also to have been the opinion of Lord *Tenterden*, as may be collected from his judgment in *Dunstan* v. *Imperial Gas Light Company* (*x*). It becomes however unnecessary to refer to other cases bearing on this point, as they are all brought in revision by *Patteson*, J., in giving the judgment of the Court of *Queen's Bench*, upon the case to which reference is first above made.

In order to determine whether the instructions and resolution of the Court of directors of the *East India Company*, to allow full pay to a retired officer, upon which the present action is founded, form a contract which falls within the principle of the exception above laid down, it will be necessary to refer shortly to the original formation of the *East India Company*, and the powers with which it has been at different periods invested by the legislature, and then to consider the nature and object of the instructions and that resolution founded thereon.

The Statute 9 & 10 *Will.* 3, c. 44, and the charter of incorporation granted by the king under the powers of that act, form the foundation of the privileges of the present united *East India Company*. And from the provisions made by that Statute it is evident, that the Company was established, originally and in the first instance, for the purposes of *trade only*; namely of exclusively trafficking and using the trade of merchandise to and from the *East Indies*, and in all places between the *Cape of Good Hope* and the *Straits of Magellan*, and with no other object or design. But without adverting to various

(*x*) 3 B. & Ad. 131.

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enlargements by the legislature, in subsequent reigns, of the term for which the charter was originally granted, it will be sufficient for the present purpose to observe, that about the commencement of the reign of *Geo.* 3, a question arose between the Government and the *East India Company*, as to the claim set up by the latter, to the possession of the territorial acquisitions in *India*, which had been made by them; a claim inconsistent with the general principle prevailing in the law, both of this and other states, namely, that all conquests made by subjects must necessarily belong to the Crown. And in consequence of this contention, an agreement was entered into between the Company and the public, that the territorial acquisitions and revenues lately acquired in the *East Indies* should remain in the possession of the Company, and their successors during the term therein mentioned; an agreement which was carried into effect by the Statute 7 *Geo.* 3, c. 57. The term therein mentioned was afterwards enlarged, and the possession and government of the territorial acquisitions continued in the said united Company by subsequent acts of the legislature, down to the present time; without prejudice, however, as declared by the preamble to the Statute of the 53 *Geo.* 3, c. 155, "to the undoubted Sovereignty of the Crown of the united kingdom of *Great Britain and Ireland*, in and over the same, or to any claim of the said united Company, to any rights, franchise, or immunities."

Upon this legislative authority, subject, however, to such control of the crown as is provided by several Statutes, does the right of the Company to the possession and government of the territories acquired in the *East Indies* depend; and from the same legislative authority, without referring to many express provisions in subsequent Statutes, it is manifest that the *East India Company* have been invested with powers and privileges of a two fold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the board of commissioners for the affairs of *India*) power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of *India*.

Now, upon the first view of the resolution to allow this pension, it is obvious that it could have no connexion whatever with the condition or powers of the Company, as a trading community; and consequently, that the exception which has been established, as to contracts entered into by corporations, instituted for the purposes of trade, in matters relating to trade, of daily occurrence and slight importance, cannot, upon any reasonable construction, be held to comprehend it. If this allowance of a retiring pension is to be considered as *a contract*, in the legal sense of that word, it was a contract made by the Company in its political character as governors, not in their trading character as merchants; it related to the territorial and political branch, as distinguished from the commercial branch of the company's affairs, (see 53 *Geo.* 3, c. 155, s. 64), and all payments under it would be chargeable upon the territorial revenues only, (see 3 & 4 *Will.* 4, c. 85, s. 9). The resolution, however, is a general regulation, affecting the whole of the army, not a separate contract with any individual officer; and although it may differ, in some particulars, from a grant of half-pay by the Crown to the officers of the army or navy, upon their retirement from actual service, yet it bears a much stronger analogy to it in the mode of its being granted, and in the consequences attending it, than to any contract. Now it is clear that no

action could be supported against any one to recover the arrears of half-pay granted by the Crown, at least, unless the money had been specifically appropriated by the government, and placed in the hands of the paymaster or agent, to the account of the particular officer; and there is no ground upon general principle to hold that an action could be maintained against any one, unless under the same circumstances, in the present case.

It was, indeed, strongly argued at the bar, that as the resolution under which the retiring pensions are paid has been sanctioned by the commissioners for the affairs of *India*, it has, by such approval, become obligatory on the Company, and in the nature of a contract; but we think there is no ground for giving such operation to the act. The object of the Statute (33 *Geo.* 3, c. 53) was that of creating a board of commissioners to superintend, direct and control the acts, operations and concerns relating to the civil and military government, or revenues of the company's territories and acquisitions in the *East Indies*; to make the approval of the board essential before instructions are sent out, but not to give additional force or legal obligation to the resolution itself, beyond that which it originally possessed.

The grant in question, therefore, appears to us to range itself under that class of obligations which is described by jurists as imperfect obligations; obligations which want the "*vinculum juris*," although binding in moral equity and conscience; to be a grant which the *East India Company* as governors, are bound in *foro conscientiæ* to make good, but of which the performance is to be sought for by petition, memorial or remonstrance, not by action in a Court of law.

Many grounds of inexpediency, in allowing a claim of the present description to be recoverable in a Court of law, readily suggest themselves. If the retired pension which is given for former services can be recovered by action, why should not the pay and allowances for actual service be equally so during their continuance? And yet how frequently is it not only expedient, but absolutely necessary, that military pay should be suspended and kept in arrear beyond the day when it becomes due, and until the service, in respect of which it is earned, has been entirely completed? Not to mention the expence and inconvenience which must arise, if a suit might be instituted by each individual officer, and the prejudice which such litigation would necessarily occasion to the military service. But if the allowance of this pension will furnish a ground of action against the company, no legal distinction can be assigned why the grant of the pay during actual service, which is authorized by general orders, founded on resolutions of the directors, and confirmed in the same manner by the board of commissioners, should not be equally the ground of an action of law.

It is enough, however, to say, that though the Company undoubtedly might, if they had thought proper, have made a grant under their common seal, for the payment of this pension, by which they would have rendered themselves liable to an action in a Court of law, yet they have not done so; and it appears to us, that this grant, not under seal, does not fall within the reason or principle of the exception which has been above adverted to; and, consequently, that it must be governed by the general rule of law, that a corporation aggregate cannot be sued upon a contract not being under their common seal.

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We, therefore, think the bankrupt himself could not have had a right of action against the Company; and that, consequently, no such right has passed to his assignees, and, therefore, we give judgment of nonsuit.

Judgment for the defendants.

Ex parte MARY ANN MANN.

One of the commissioners to take the acknowledgment of a married woman, resident at *Illinois*, in *America*, was described as "Judge *M'R.*" In his affidavit he signed himself "*S. M'R.*, barrister;" and the affidavit was taken before a notary public: —*Held*, sufficient, upon an affidavit that judges frequently practised at the bar there, and that notaries public were authorized to take affidavits.

B. *ANDREWS*, Q. C., on a former day applied to enrol the acknowledgment of the execution of a deed by a married woman, resident at *Illinois*, in *America*. The officer of the Court had objected to file the certificate under 3 & 4 *W.* 4, c. 74, s. 85 (*a*), on the ground that the commission was directed to "Judge *M'Roberts*" as one of the commissioners; but in his affidavit the commissioner signed himself, "*Samuel M'Roberts*, barrister," there being no affidavit of the identity of *Samuel M'Roberts* and Judge *M'Roberts*; and also that the affidavits verifying the certificate were sworn before a notary public, though it did not conclusively appear that notaries public were the proper persons to take affidavits. He contended that the identity of *Samuel M'Roberts* and Judge *M'Roberts*, sufficiently appeared from the recital in the certificate that the persons signing it were the persons to whom the commission was directed; and that the Court would receive the affidavits taken before a public functionary, it not appearing that any other description of persons were authorized to take affidavits in *America*. He cited *Domvill*, dem. *Kinderley* tenant, *Collier* vouchee (*b*), *Lovibond* v. *Morshead* (*c*).

TINDAL, C. J.—Surely an affidavit of these facts might be obtained from commercial persons, resident in *England*. We should be strict in acting upon this Statute. You had better come again.

Andrews now renewed his application, having procured an affidavit made by a person in the office of the *American* minister, that he had no doubt of the indentity of *Samuel M'Roberts* and Judge *M'Roberts*; and that it is usual in *America* for judges to practise at the bar, and that notaries public were the proper persons to take affidavits; and therefore the Court granted the order.

(*a*) Enacting, That "every certificate of the taking of an acknowledgment by a married woman, together with an affidavit verifying the same, shall be lodged with some officer of the *Common Pleas*, and such officer shall examine the certificate, and see that it is duly signed and duly verified by affidavit."

(*b*) 3 Taun. 275.

(*c*) 2 N. R. 57.

CARDEN v. The GENERAL CEMETERY COMPANY.

Common Pleas.

Jan. 11.

An Act of Parliament, incorporating a public company, directed that the costs of procuring the Act should be paid out of the first monies to be raised under it:—

Held—first, that a party who had assisted in procuring the Act, might sue the company for remuneration, without shewing any retainer or employment;—

Secondly, that the plaintiff need not expressly allege that his services were of any value to the defendants, as they had adopted the Act of Parliament procured by him;—

Thirdly, that an allegation that the defendants had received monies, out of which they might have paid the plaintiff, was sufficient upon *general* (though it might not have been on *special*) demurrer;—

Fourthly, that *debt* was a proper form of action.

Semble, *Case* also would have lain.

DEBT: for that whereas before the passing of a certain Act of Parliament, passed in the 2d and 3d *William* the fourth, entitled "an Act for establishing a General Cemetery, for the interment of the dead in the neighbourhood of the metropolis" to wit, on the 1st *July*, 1832, the plaintiff bestowed his work and labour of great value, to wit, &c., and paid, laid out, and expended divers sums of money, to wit, &c., in and about the applying for, obtaining and passing the said Act of Parliament, and in and about divers other matters and things, and expences preparatory and relating thereto. And whereas after the passing of the said Act of Parliament, to wit, on the 12th *July*, 1832, and on divers other days and times between the last mentioned day, and the commencement of the suit, the said General Cemetery Company, by virtue of the said Act of Parliament, and of powers and provisoes therein contained in that behalf, raised and received divers sums of money to a large amount, to wit, &c., out of which the said company might and ought to have paid the plaintiff the said sums of money. And thereupon it became, and was the duty of the said General Cemetery Company, out of the sums so received, to pay the plaintiff the said several sums of, &c., yet the said General Cemetery Company did not in the first place lay out and apply, nor have since (although often requested) in any manner laid out or applied the said sums of money so raised and received as aforesaid, or any part thereof, towards paying or discharging the said sums so due and owing to the plaintiff as aforesaid, whereby, &c.

Second plea; that the plaintiff bestowed his work and labour, and paid, laid out and expended the monies in and about the applying for and obtaining, &c., the said Act of Parliament, and in and about the other matters, &c., in the declaration mentioned, voluntarily and of his own accord, without the request of any person whatsoever, and without any contract or agreement, expressed or implied, with any person whatsoever, for the payment of any money for the said work and labour, or the repayment of the said monies so paid, laid out and expended as aforesaid, or any of them. *Verification.*

Third Plea; that no account or particulars of the said work and labour so alleged to have been bestowed by the plaintiff, and of the monies so alleged to have been paid, &c., as in the declaration mentioned, with dates and other necessary particulars, vouchers, receipts and documents relating thereto, was made and delivered to the company or the directors thereof, or the officers of the company on their behalf, at any time before the commencement of the suit, in order that the same might be examined by the said company, or the directors or auditors thereof, &c. *Verification.*

Demurrer to *second* plea.—That it is not thereby shewn that there was or were any person or persons with whom the plaintiff might have contracted for the work and labour in the declaration mentioned, or for the payment of any money to the plaintiff for the price, &c., of such work and labour, or the repayment, &c., nor that the plaintiff was not the sole person who applied for and obtained the Act of Parliament, and incurred the expences, &c., in the declaration mentioned. That the words "voluntarily and

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CARDEN *v.* The GENERAL CEMETERY COMPANY.

Common Pleas.

Jan. 11.

An Act of Parliament, incorporating a public company, directed that the costs of procuring the Act should be paid out of the first monies to be raised under it:—

Held—first, that a party who had assisted in procuring the Act, might sue the company for remuneration, without shewing any retainer or employment;—

Secondly, that the plaintiff need not expressly allege that his services were of any value to the defendants, as they had adopted the Act of Parliament procured by him;—

Thirdly, that an allegation that the defendants had received monies, out of which they might have paid the plaintiff, was sufficient upon *general* (though it might not have been on *special*) demurrer;—

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Second plea; that the plaintiff bestowed his work and labour, and paid, laid out and expended the monies in and about the applying for and obtaining, &c., the said Act of Parliament, and in and about the other matters, &c., in the declaration mentioned, voluntarily and of his own accord, without the request of any person whatsoever, and without any contract or agreement, expressed or implied, with any person whatsoever, for the payment of any money for the said work and labour, or the repayment of the said monies so paid, laid out and expended as aforesaid, or any of them. *Verification.*

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Demurrer to *second* plea.—That it is not thereby shewn that there was or were any person or persons with whom the plaintiff might have contracted for the work and labour in the declaration mentioned, or for the payment of any money to the plaintiff for the price, &c., of such work and labour, or the repayment, &c., nor that the plaintiff was not the sole person who applied for and obtained the Act of Parliament, and incurred the expences, &c., in the declaration mentioned. That the words "voluntarily and

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of his own accord," are, as applied to the matters in the declaration mentioned, words of doubtful and ambiguous signification, and do not import that the said plaintiff had rendered his services, and paid and expended his monies, gratuitously; and that the plea does not traverse, nor confess and avoid the cause of action, in this, that the declaration states and discloses facts, which, if true, raise a statutory duty in the company to pay the plaintiff the monies for which this suit has been commenced, which duty, and the facts from which that duty arises, the second plea does not deny, but on the contrary, confesses the facts, and assumes to answer them, by alleging that the declaration is defective in not alleging certain circumstances which would have been necessary to have been set forth in the declaration, had the plaintiff rested his suit upon any contract made between him and the said company, or any other person or persons: &c.

Demurrer to *third* plea.—That it amounts to a negative payment, in this, to wit, that it does not specifically state that there was no account or particulars of work and payments delivered; but merely states that no account of the work and payments, with dates, &c., was delivered to the company; and also that the plea has two intendments; one, that no account was ever delivered by the plaintiff to the company; the other, that an account was delivered, but an account defective in dates, &c. And the company do not by the plea deny or confess and avoid the cause of action in this, to wit, that in opposition to the statutory duty in the company to pay the monies, &c., disclosed by the declaration, the plea alleges a neglect in the plaintiff to furnish them with a certain account, with which he was not obliged to furnish them; and the particulars of which they, in order to discharge the duty imposed on them by the Statute, were bound to obtain and acquire the knowledge of, and to have acquired from the plaintiff: &c.

The case was argued in *Trinity* Term.

W. H. Watson, for the plaintiff, insisted upon the causes of demurrer to the second and third pleas. The Act of Parliament in question (2 & 3 *W.* 4, c. cx,) after reciting that it would be of great public advantage if a general cemetery, on an extensive scale, were established in an open situation adjacent to the metropolis, for the interment of the dead, under certain regulations and restrictions; and that the several persons thereinafter named, (including the plaintiff) were willing at their own costs and charges to establish such cemetery; constituted them a body corporate, by the name of "the General Cemetery Company;" and by sec. 20, enacted "that all the money to be raised by virtue of the Act should be laid out and applied, in the first place, in paying and discharging all costs and expences incurred in applying for, obtaining and passing the Act, and all other expences preparatory or relating thereto, and the remainder of the money should be applied in and towards purchasing lands, &c., and making and maintaining the said cemetery, and other works by the Act authorized to be made, and in otherwise carrying the Act into execution."

The pleas in question admit that the work was done by the plaintiff, and it is no answer to his claim to say that he was a volunteer; there is nothing in the Act to make the delivery of particulars a condition precedent to the plaintiff's right to recover. The Act having imposed the duty on the company to make the payments claimed by the plaintiff, *debt* is the proper

remedy; *Tilson* v. *Warwick Gas Light Company* (*a*), *Vin. Abr.* "Debt" (I. 2,) *Com. Dig.* "Action on Statute."

Sir *W. W. Follett*, Q. C., for the defendants.—As to the second plea; the 20th section of the Act does not give any right of remuneration to parties who had it not before, and clearly the plaintiff could not before the Act have claimed payment for voluntary services; the Act only authorizes the company to administer the funds in a particular manner, and not to make payments to a mere volunteer; if they may pay one, they may pay ten thousand, to the utter destruction of their funds.

It may be admitted that the third plea is not sustainable; but, independently of the pleas, the action will not lie; for it appears by the recital of the Act, that the plaintiff himself was one of the persons who were willing to establish the Cemetery at their own costs and expences, and he is a member of the company against whom the action is brought.

Then the declaration itself is bad; for first it does not allege that the plaintiff's services were of any value to the defendants; secondly, it does not allege that the defendants have sufficient funds in hand to pay the plaintiff; and thirdly, assuming that they have funds, the action should have been in *case*, for a misapplication of those funds, and not in *debt*; for it might be a breach of duty on the part of the directors, but would not give rise to any debt between them and the plaintiff. In *Tilson* v. *Warwick Gas Light Company*, it was expressly alleged that the plaintiff was retained and employed to solicit and obtain the Act of Parliament.

Watson, in reply.—It is not open to the defendants to take these objections to the declaration, except upon special demurrer, *Tilson* v. *Warwick Gas Light Company*, *Cane* v. *Chapman* (*b*). But it is not material that the declaration should state that the plaintiff's services were of value to the defendants; it does allege that he bestowed his labour in procuring the Act; and then the Act confers upon him his right of remuneration; secondly, the declaration alleges that the defendants have received money, out of which they might and ought to have paid the plaintiff, and that is sufficient; if it was meant to say that the defendants had received no money, they ought to have traversed this allegation; the third objection has been previously disposed of.

Cur. adv. vult.

TINDAL, C. J.—The whole of the argument in this case, although it arose upon a special demurrer to the second and third pleas of the defendants, has turned upon the validity of the declaration; for as to the two pleas which are demurred to, it was virtually admitted on the part of the defendants that they are not sufficient in law.

The defendants have therefore insisted upon various objections against the right of the plaintiff to recover in this form of action, as appearing upon the declaration; and the question is, whether any of those objections are available in law.

(*a*) 4 B. & C. 962; 7 D. & R. 376. (*b*) 2 H. & W. 355; 5 A. & E. 647; 1 N. & P. 104.

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The first objection which has been raised is, that as the plaintiff had no legal claim against any one before the passing of the Act for his labour and expences, the same having been bestowed and incurred without any request from any one, and therefore, as it is contended, gratuitously, so the Act never intended to give him a claim against the defendants, which he had not before against some individual. But looking at the 20th sec. of the Statute, under which the defendants were incorporated, we think the labour and expences described in the declaration are precisely those which are intended by the 20th sec. of the Act, to be paid and discharged out of the first monies which shall be raised by the company by virtue of such Act. The Act probably contemplated the difficulty which would arise from many of the expences being necessarily incurred, and much care and labour necessarily bestowed, before the company were incorporated; and consequently at a time when there could be no privity of contract between the party who had so expended his money and bestowed his labour, and the company; and therefore expressly directs that all the money to be raised by the company by virtue of the Act, shall be laid out and applied, in the first place, in paying and discharging all costs and expences incurred in applying for and obtaining and passing the Act, and all other expences preparatory or relating thereto. It seems therefore to us, that the very object of the clause was to give a remedy to the plaintiff where he had none before; whether or not by an action of debt, or by an action on the case, forms a separate and distinct ground of objection.

It was next objected that it does not appear the labour and expences were of any value to the defendants. To which it seems a sufficient answer, that the declaration alleges it to be labour and expence incurred in procuring the very Act of Parliament under and by which the defendants obtained their incorporation; that it was labour bestowed and expence incurred by the plaintiff, which the individuals, who afterwards became the company, have adopted; and as to the amount in value of such labour and expenditure, the jury would have to fix that by their verdict.

It was next objected, on the part of the defendants, that the declaration does not state that the defendants had any money in their hands at the time the plaintiff demanded his debt, or at all events, that they had sufficient in their hands to satisfy the demand of the plaintiff. And if this objection had been made the ground of a special demurrer to the declaration, it might, perhaps, been held that the allegation is insufficient for that purpose. But the declaration does, in fact, allege, that the company, after the passing of the Act, "under and by virtue of the Act, did receive divers sums of money, out of which they *might*, and ought to, have paid and satisfied the plaintiff;" and we think this amounts, in substance, to an averment that the company had enough to satisfy the plaintiff's demand, and, therefore, is sufficient upon a general demurrer. And if, in fact, the company had never received money to such an amount, as that, out of it, they *might* have paid the plaintiff's demand, the defendants could have traversed the averment; or, if they had received sufficient, but had expended what they received, in satisfying other claimants who came equally with the plaintiff within the description contained in the twentieth section, the defendants might have pleaded this special matter as an answer to the action.

The last, and which appears the more important objection to the declara-

tion was, that the action was misconceived; for that if any action is maintainable, it ought to have been an action on the case, for the misapplication of the funds raised by the Statute, but not an action of debt. That the plaintiff might have maintained an action on the case, for the breach of duty on the part of the defendants, in their application of the funds, may, perhaps, be true; but, we think, at all events, the plaintiff had his election under the circumstances to bring case or debt. The present declaration does not appear to us to be distinguishable, in substance, from that in *Tilson* v. *Warwick Gas Light Company*. *There* the declaration states the work and labour to have been done by the plaintiff, "on behalf of certain persons, projectors of a certain undertaking for lighting the town of *Warwick* with gas;" but who those projecters were, is left quite uncertain; no privity whatever is shewn between those projectors and the defendants to the action. In this case, the declaration alleges the work and labour to have been bestowed by the plaintiff before the passing of the Act, without stating any body on whose behalf or request it was done; whether, however, it was performed without a request, or at the request of a stranger, seems immaterial. And in both the cases the declarations then proceed to bring the plaintiff within the provision of each respective Statute, directing the payment of his demand to be made out of the first monies to be raised under each Act. In the case referred to, it was said by *Holroyd*, J., "That the facts stated in the first count were sufficient to shew that the defendants were under a legal obligation to pay the money to the plaintiff." And further he adds, that "the Act of Parliament directed that the costs of obtaining the bill shall be paid out of the first monies subscribed under the Act. When the money so subscribed came to the possession of the company, they became, by law, liable to pay those costs; and the amount of them was money which the defendants owed to, and unjustly detained from, the plaintiff." We concur in this reasoning, and think it gives the answer to the last objection.

Upon the whole, we think the plaintiff is entitled to judgment.

Judgment for plaintiff.

RUSSELL *v.* YORKE.

Jan. 17.

Where less than one-sixth has been taxed off an attorney's bill, under 2 G. 2, c. 23, s. 23, the Court is bound to exercise their discretion as to allowing the attorney the costs of taxation, according to the reasonableness of the bill.

THE plaintiff's attorney, in *September*, 1837, sent in his bill, *not* signed, as required by Statute 2 *Geo.* 2, c. 23, s. 23 (*a*), amounting to 973*l.* 10*s.* In *August*, 1838, the bill was referred to taxation, when the plaintiff entered

(*a*) Enacting, That no attorney shall sue for his fees till one month after the delivery of a signed bill, "and upon application of the party chargeable by such bill, and upon the submission of the said party to pay the whole sum that, upon taxation of the bill, shall appear to be due, to the attorney," the judges may refer the bill to be taxed without any money being brought into Court for that purpose; "and the Courts are authorized to award the costs of such taxation to be paid by the parties, according to the event of the taxation of the bill, that is to say, if the bill taxed be less by a sixth part than the bill delivered, the attorney is to pay the costs of the taxation; but if it shall

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into the usual undertaking to pay what should be found due. The Master having taxed off 147*l.* 10*s.* (being 15*l.* odd less than one-sixth of the entire bill,)

Humfrey, last Term, obtained a rule *nisi* that the plaintiff should pay the attorney the costs of the taxation; upon affidavits stating that 637*l.* of the bill was made up of disbursements, and that, of the sum of 147*l.* 10*s.* taxed off, 50*l.* was also claimed for money actually disbursed, and that a large portion of the residue were charges for journeys to and from *London*, made at the desire of the plaintiff or his counsel.

Wilde, Serjt., shewed cause.—*First*, the case is not within the jurisdiction of the Court. It has been said, that the Courts have no direct authority to refer an attorney's bill to taxation, except under the Statute of *Geo.* 2, *Howard* v. *Groom* (*b*). Perhaps that is not strictly correct.—[*Bosanquet*, J.—The judges have so held after a conference together (*c*).]—At any rate, it is clear the Court has no authority to order the plaintiff to pay the attorney the costs of taxation, independently of the Statute; and the Statute not having been complied with, by reason of the non-delivery of a signed bill, the Court has no authority to interfere, *Gerard* v. *Arnold* (*d*). *Secondly*, assuming this case to be within the Statute, it is discretionary on the Court to allow the costs of taxation, *Elwood* v. *Pearce* (*e*); and they will not do so where the charges are unreasonable, as in this case. (He then argued upon various items of the bill to show their unreasonableness.)

Humfrey, in support of the rule.—*First*, this case is within the Statute; it is clear the parties, notwithstanding the non-delivery of the signed bill, intended to act upon the Statute, as the plaintiff entered into the submission to pay what should be found due, as thereby required. *Secondly*, as less than one-sixth has been taxed off the bill, the Court will, as a matter of course, order the client to pay the costs of taxation; it was so held in *Miles* v. *Revett* (*f*), where *Taunton*, J., said, "I believe the provision of the Statute has always been considered *reciprocal*. If *more* than one-sixth is taken off, the attorney pays the bill; if *less*, the client."

TINDAL, C. J.—If this case is within the Statute of *Geo.* 2, as the counsel for the attorney contends, it appears to me we are bound to look into the reasonableness of his bill under the express words of the 23d section; and it was so held in *Baker* v. *Wills* or *Mills* (*g*), where the Court discharged a rule for allowing the attorney the costs of taxation, although less than one sixth had been taxed off. I cannot see how *Miles* v. *Revett* can be reconciled with the Statute; it looks almost like repealing it; and I think we should be shrinking from our duty if we did not in this case exercise our discretion in

not be less, *the Court, in their discretion, shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bill.*"

(*b*) 1 Har. & Wol. 355; 4 D. P. C. 21.

(*c*) But see *ante*, p. 265, n. (*v*).

(*d*) 1 Horn & Hurls. 18; 6 D. P. C. 336.

(*e*) 3 Bing. 83; 1 Mo. & Sc. 159; 1 D. P. C. 251.

(*f*) 3 N. & M. 767; 1 A. & E. 856.

(*g*) 2 C. & M. 415; 2 D. P. C. 382.

examining the reasonableness of the charges, and refusing to allow the attorney his costs, if we think those charges unreasonable. Now, upon looking into the bill, there can be no doubt that several of the items taxed off were highly unreasonable; and, therefore, this rule must be discharged.

The other judges concurring,

Rule discharged.

WATERS *v.* The EARL of THANET.

Jan. 28.

THE first count in the declaration was on a bill of exchange, drawn by the defendant, indorsed by him to *J. Tabe*, and by *J. T.* to the plaintiff. The defendant had obtained a rule to plead (*inter alia*); first, that the defendant did not draw the bill; and, secondly, that he did not indorse it. (There were other pleadings immaterial to the question before the Court.) The second plea, as delivered by the defendant, was, that he did not indorse the bill to *J. T. modo et formâ*; whereupon

There is no difference between a plea, that defendant did not indorse a bill (generally); and one that he did not indorse it to *A. B.* (the indorsee.)

Bayley applied for a rule, calling on the defendant to make his second plea conformable to the rule to plead. He produced affidavits, showing that the matter had been several times before a judge at Chambers, who ultimately referred the parties to the Court; that the defendant had pressed for leave to traverse the indorsement by *Tabe*, which had been opposed on the score of the difficulty it would place the plaintiff under, if he should not be able to find *Tabe* to give evidence; and leave so to plead was accordingly refused. He contended the plea, as delivered, was double, or, at all events, contained a negative payment; for if it could only be proved by shewing an indorsement to *Tabe*, it would have the same effect as traversing his indorsement.—[*Bosanquet*, J.—Does not the plea admit the indorsement by *Tabe?*]—There may be a doubt whether the plaintiff would prove the affirmative, merely by shewing the defendant's hand-writing.—[*Bosanquet*, J.—Is the indorsement in blank?]—Yes; and there is no intermediate indorser; but still the defendant might contend we had not proved the whole issue.—[*Vaughan*, J.—A blank indorsement is a general indorsement to any one into whose hands the bill may come.—*Tindal*, C. J.—Suppose the traverse were general, that the defendant did not indorse the bill *modo et formâ*.]—It would be sufficient if the plea were in that form.—[*Tindal*, C. J.—I confess my mind is not fine enough to see the distinction.

Per Curiam;

Rule refused.

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Jan. 30.

In *covenant* for breaches in an agreement for a lease, where, from the plaintiff's delay in proceeding, the defendants had reason to conclude he had abandoned the action, the Court allowed one of the defendants to plead his bankruptcy and certificate, *puis darrein continuance*, without an affidavit that the matter of the plea arose within eight days previously, as required by *R. H.*, 4 *W.* 4, (Pleading Rules) I. 2.

KIBBLEWHITE *v* REYNOLDS and GREEN.

COVENANT for breaches of an agreement for a lease. On the 24th *May*, 1837, an appearance was entered for both the defendants; on the 26th, the declaration was delivered to the defendant *Green*; on the 23d *June*, pleas were delivered, and 1*s.* was paid into Court in satisfaction of the damages sustained by the plaintiff, in respect of the breaches of the covenants. No further step was taken in the action till the 9th *January*, 1839, when the defendants were served with notice of the plaintiff's intention to proceed. In the meantime (in *May*, 1838,) the defendant, *Reynolds*, had become bankrupt, and had obtained his certificate (in the following *October*.)

Knowles, on a former day in this Term, obtained a rule *nisi* that the defendant *Reynolds* should be at liberty to plead his bankruptcy and certificate, *puis darrein continuance*, in bar of the further maintenance of the action against him, without producing an affidavit that the matter of the plea arose within eight days of pleading the same, as required by *R. H.* 4 *W.* 4, (Pleading Rules) I. 2 (*a*). He produced an affidavit, stating the above facts; and that in consequence of the length of time that had elapsed, the defendants had concluded that the plaintiff did not intend further to prosecute the action; and that they believed the plaintiff's attornies were cognizant of the bankruptcy of the defendant *Reynolds*.

W. H. Watson, shewed cause.—The Court ought to be satisfied that the plea is one that can, in law, be pleaded. The affidavits do not state that the cause of action could have been proved under the *fiat*; and the record shews that it is for unliquidated damages.

Per Curiam.—The Court cannot refuse what is prayed for, unless it be clearly shewn that the proposed plea cannot be pleaded.

Rule absolute, on payment of costs.

(*a*) Providing "That no such plea (*puis darrein continuance*) shall be allowed, unless accompanied by an affidavit, that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court, or a judge, shall otherwise order."

SUMMERS *v.* RAWSON and others.

Common Pleas.

Jan. 30.

The Court will grant a commission to examine witnesses abroad, even after a cause is set down for trial, unless it clearly appears that the application is made for the purpose of fraud or delay.

THE declaration in this case was upon a special contract to accept bills upon consignments from *India*, and was filed in *February*, 1838; the defendants pleaded (*inter alia*) that the goods were charged above the market price in *India*. The cause was set down for trial, and stood second in the special jury paper.

Sir *W. W. Follett*, Q. C., now applied for a commission to examine witnesses in *India*; against which

Wilde, Serjt., shewed cause in the first instance.—It appeared from his affidavits, that the consignments had been actually made, and invoices invariably sent; that the defendants had already applied for an injunction to stay this action, which was afterwards dissolved; and that they had formerly pleaded in abatement. He contended that, from these facts, the Court would infer that the application was only made for the purposes of delay.

Follett, in support of the rule.—The plaintiff does not venture to swear that he does not believe this is a *bonâ fide* application.

Per Curiam.—Before we refuse such an application as the present, we ought to be clearly satisfied that it is made for the purpose of fraud or delay.

Rule absolute.

NORMAN *v.* WINTER.

Jan. 31.

1. It is sufficient to describe a defendant, in a writ of summons, as of his last known place of abode, though four years may have elapsed since he ceased to reside there.

2. *Query*, whether a *pluries* writ of summons can be issued before the *alias* is returned.

3. An *alias* or *pluries* may issue and bear *teste*, within a reasonable time after the writ of summons has expired.

4. An *alias pluries* was issued after a *distringas* for outlawry, which was not acted upon:—*Held*, valid, and the *distringas* was set aside.

5. A *distringas* for outlawry issued 7th *June*, returnable 2d *November*. On 25th *October*, (there not then being fifteen days before the return day,) the plaintiff, without a judge's authority, issued another *distringas*, *tested* 7th *June*: the Court refused to amend the *teste*, and set aside the *distringas*.

6. *Query*, whether the last *distringas* was not a mere nullity.

THIS was an action on certain promissory notes, made by the defendant, and dated from 53, *Russell-square*, where the defendant, however, had ceased to reside since 1833.

The following dates and facts appeared from the different affidavits:—

5th *April*, 1837, a writ of summons issued, directed to the defendant as of 53, *Russell-square*.

1st *September*, return of *non est inventus*; an *alias* writ of summons issued, (the return to which was made, according to the plaintiff's affidavits, on 30th *January*, but according to the defendant's, on 6th *February*, 1838.)

29th *January*, 1838, a *pluries* writ of *summons* issued.

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31st *January*, a rule was obtained for a *distringas* to compel appearance (*a*).

1st *March*, the *distringas* issued, returnable 16th *April*.

1st *May*, the *distringas* was returned and filed.

10th *May*, (last day of *Easter Term*) a rule, obtained (on a former day in that Term) on behalf of the defendant, to set aside the *distringas*, was discharged, on the ground that it did not appear that the defendant had given authority to any one to apply on his behalf.

26th *May*, a second *distringas* to compel appearance was applied for, but refused, on the ground of defect of the affidavits (*b*).

2d *June*, upon plaintiff's application, the *distringas* for appearance (of 1st *May*) was quashed, and a rule for a *distringas* for *outlawry* was granted for non-appearance to the *alias*.

7th *June*, the *distringas* for *outlawry* issued, returnable the 2d *November*.

27th *June*, the *pluries* was returned and filed, and an *alias pluries* was issued, not yet returned.

25th *October*, a *third distringas* (for *outlawry*) issued, tested 7th *June*, pursuant to a *præcipe* subscribed "by judge's order, filed 7th *June*, 1838," but, in fact, no such order had been made, and this *distringas* was issued without any authority.

W. H. Watson, in last *Michaelmas Term* (5th *November*) obtained a rule *nisi* to set aside the several writs of summons, *alias*, &c., and *distringas*, with costs; upon the grounds, *first*, that the defendant's residence was improperly described; *Roberts* v. *Wedderburne* (*c*), *Rolfe* v. *Swann* or *Swain* (*d*); *secondly*, that the *pluries* summons was issued before the *alias* was returned; *thirdly*, that the *alias* and *pluries* were issued and tested after the previous writs of summons had expired, *Lemon* v. *Lemon* (*e*), *Sewell* v. *Brown* (*f*), *Abbotts* v. *Kelly* (*g*); *fourthly*, that the *alias pluries* was taken out while a *distringas* for outlawry was in force, *Reay* or *Ray* v. *Dow* or *Youde* (*h*).

This rule was enlarged till this Term; on a former day of which, (12th *January*,)

Wilde, Serjt., obtained a rule *nisi* to alter the *teste* of the last writ of *distringas*, from the 7th of *June*, to the 25th of *October*, the day on which it really bore date; he produced an affidavit that the *distringas*, issued on the 7th *June*, and returnable on the 2d of *November*, had been kept, by mistake, by the plaintiff's attorney till the 25th of *October*, when there were not fifteen days before the return, for the writ to be left at the sheriff's office pursuant to 2 *W.* 4, c. 39, s. 5.

The two cross rules came on for argument in this Term (on the 19th and 21st *January*.)

Wilde, for the plaintiff.—The defendant's only object being to take ad-

(*a*) *Ante*, 131.

(*b*) *Ante*, 256; 4 N. C. 637; 6 Sc. 378.

(*c*) 1 N. C. 4; 4 Mo. & Sc. 488; 2 D. P. C. 816.

(*d*) 2 Ga. 82; 1 M. & W. 305; 5 D. P. C. 106.

(*e*) 2 Sc. 506.

(*f*) 1 Hod. 317.

(*g*) 3 Hod. 32; 3 N. C. 478; 4 Sc. 256; 5 D. P. C. 478.

(*h*) 2 M. & W. 188; 5 D. P. C. 310.

vantage of the Statute of Limitations, the Court will not favour her application.

First, the plaintiff was justified in describing the defendant as of her last known place of abode, as he could not discover her actual residence, *Welsh* v. *Langford* (*i*), *Hill* v. *Harvey* (*j*). This case differs from *Ward* v. *Watt* (*k*), where the writ did not state the defendant's place of residence at all; and from *Margetson* v. *Tugghe* (*l*), where the defendant's christian name was omitted. In *Buffle* v. *Jackson* (*m*), it was held, that a variance between the description of the defendant's residence in the *affidavit* to hold to bail, and the *capias*, was immaterial. In *Clarke* v. *Palmer* (*n*), the writ, although not properly indorsed with the description of the defendant, would not have been set aside if the sheriff had not been liable to an action for escape. At any rate, the motion to set aside the original writ of summons is too late now; *Wright* v. *Warren* (*o*).

Secondly, there is nothing in the 2 *W.* 4, c. 39, s. 10 (*p*), that requires that the first writ must be returned and filed before a second is issued; it need only be done for the purpose of preventing the effect of the Statute of Limitations: *Nicholson* v. *Rowe* (*q*), *Gregory* v. *Desanges* (*r*). The objection might be made, if the Statute was pleaded and replied to, but not before.

Thirdly, the plaintiff is entitled to continue a writ of summons by *alias* and *pluries*, and to issue writs of *distringas* thereon after the original writ of summons has expired; for the writ of *distringas* being only to enforce appearance, cannot properly be issued till the writ of summons has been returned, as a defendant may appear any time before the return. The cases of *Lemon* v. *Lemon*, *Sewell* v. *Brown*, and *Abbotts* v. *Kelly*, are not much to be relied upon. The two former seem to be the same case under different names, and *Abbotts* v. *Kelly* was decided upon the authority of the former case, without adverting to the principle. The authority of both these cases has been doubted by *Coleridge*, J., in *Richards* v. *Townsend*, a recent case in the *Bail Court*, not yet reported.

Fourthly, the *alias pluries* writ may be taken to stand by itself, as the plaintiff never acted on the *distringas* of the 7th of *June*.

(*i*) 2 D. P. C. 498.

(*j*) 1 Ga. 185; 2 C. M. & R. 307; 4 D. P. C. 163.

(*k*) 5 D. P. C. 94.

(*l*) 2 H. & W. 85; 5 D. P. C. 9.

(*m*) 2 D. P. C. 505.

(*n*) 9 B. & C. 153; 4 M. & R. 141.

(*o*) 3 Mo. & Sc. 163; 2 D. P. C. 724.

(*p*) Enacting, "That no writ, issued by authority of this Act, shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon, or sued therewith: Provided always, that no first writ shall be available to prevent the operation of any Statute, whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or sued therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in a continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ, and shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ, and return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be."

(*q*) 2 C. & M. 469.

(*r*) 3 N. C. 85; 3 Sc. 534; 5 D. P. C. 193.

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Fifthly, the plaintiff should be permitted to amend the third *distringas* by altering the *teste*, as this writ was, in effect, the same as the second, which became inoperative, according to strict practice, by its being accidentally delivered too late to the sheriff. This case differs materially from *Byfield* v. *Street* (*s*), and *Colston* v. *Berens* (*t*), where the defendant had been arrested upon an irregular writ, and the Court refused to amend. In *Lakin* v. *Watson* (*u*), the Court allowed a writ of summons to be amended by inserting the name of a co-executrix as a co-plaintiff, on the ground that the right of action would otherwise have been lost by the Statute of Limitations.

Watson, for the defendant.—Nothing appears upon the affidavits to shew that the Statute of Limitations may not be a fair defence. The first writ of *distringas*, which issued on the 1st *March*, was *functus officio* on the 16th of *April*, when it was made returnable, or, at any rate, on the 1st *May*, when the return was actually made and filed. No sufficient reason is given for the non-execution of the second *distringas*, issued on the 7th of *June*, which should have been lodged with the sheriff fifteen days before the 2d of *November*; and the plaintiff's attorney finding, on the 25th of *October*, that, by his *laches*, he had let the time go by for the due execution of the writ, issued a third *distringas*, without a judge's order, and tested on a different day from that on which it issued; the defendant then, on the 5th of *November*, applies to set aside that writ, and, as she comes before any new step is taken in the cause, she is in good time. The plaintiff now seeks to amend that writ, but such an application cannot be acceded to. In *Kenworthy* v. *Peppiat* (*v*), the Court refused to amend a writ which had been made returnable on a *dies non*, upon the ground that it would be making a new writ; and though the principle of that case may be considered to have been broken in upon by *Lakin* v. *Watson*, yet *that* case has been virtually overruled by *Roberts* v. *Bate* (*w*).

Upon the other points, his arguments and authorities were the same as those upon obtaining the rule *nisi*.

Cur. adv. vult.

TINDAL, C. J.—The rule which has been obtained by the defendant in this case calls upon the plaintiff to shew cause why the several writs of summons, *alias* and *pluries* summons, and three writs of *distringas*, issued in this cause, should not be set aside for irregularity, with costs. And, in order to see the nature of the irregularity complained of, it will be necessary to state briefly the particulars of each.

The original summons was issued on the 5th of *April*, 1837, and returned on the 1st of *September* of the same year.

The *alias* was issued on the 1st of *September*, 1837, and returned, according to the statement of the plaintiff, on the 30th of *January*; according to that of the defendant, on the 6th of *February*, 1838.

The *pluries* was issued on the 29th of *January*, and returned and filed on the 27th of *June*.

(*s*) 10 Bing. 27; 3 Mo. & Sc. 406; 2 D. P. C. 739.
(*t*) 3 D. P. C. 253.
(*u*) 2 Cr. & M. 685; 2 D. P. C. 633.
(*v*) 4 B. & A. 288.
(*w*) 1 W. W. & D. 307; 6 A. & E. 778.

And, in addition to these, an *alias pluries* writ has been issued on the 27th of *June*, which has not been yet returned.

There have also been three writs of *distringas* issued.

The first, on the 1st of *March*, 1838, pursuant to a rule of the 31st of *January* preceding, for non-appearance to the *pluries* summons, and returnable on the 16th of *April*. This writ was returned and filed on the 1st of *May*.

But on the 2d of *June*, the plaintiff applied to quash his own writ of *distringas* for appearance, and issued another for outlawry, for non-appearance to the *alias* summons of the 1st of *September*.

This second writ of *distringas* issued accordingly on the 7th of *June*, under the rule of the 2d; returnable on the 2d of *November*, for non-appearance to the *alias* summons of the 1st of *September*.

The third *distringas* issued on the 25th of *October*, tested on the 7th of *June*, for the purpose of proceeding to outlawry on the *alias* writ of summons of the 1st of *September*, 1837, without any further rule or order.

It may be convenient to consider, in the first place, the objections which have been raised against the regularity of the writs of *distringas*, because the disposition of the legality or regularity of these writs very much clears the way to the consideration of the writs of summons, and the several objections thereto.

Now, the first *distringas* having been quashed by the Court, on the plaintiff's own motion, by rule of the 2d of *June*, upon the ground, as it would seem, of irregularity (having been issued by virtue of a rule of the 31st of *January*, for non-appearance to the *pluries* summons, tested only on the 29th *January*), may, as it appears to us, be considered as if it had never existed, and be altogether laid out of the case.

The second writ of *distringas*, which issued on the 7th of *June*, pursuant to the rule of the 2d of *June*, was perfectly regular; but this writ, having been made returnable on the 2d of *November*, and retained by the plaintiff's attorney, and not taken to the sheriff until the 25th *October*, became useless, in consequence of there not being fifteen days, as required by the Statute, between that day and the day of the returns. What effect the writ, thus sued out, but not acted upon, ought to have upon the plaintiff's proceedings by writs of summons, taken out, or intended to be taken out, in continuation of each other, we will afterwards proceed to consider.

The third *distringas*, for the purpose of outlawry, was issued on the 25th of *October*, and made returnable on the 12th of *November*, for the purpose of supplying the place of the second *distringas*, which had become unavailable. This *distringas* was issued without any new authority from the Court or judge, and whilst the writ, issued pursuant to the rule of the 2d of *June*, was still in existence. Moreover, it was issued on a *præcipe*, subscribed "by judge's order, filed 7th of *June*, 1838," though no such order was ever, in fact, made. The existence of this writ was not discovered till the 3d of *November*, 1838; and the motion to set it aside, together with all the other writs, was made on the 5th; and the issuing of this writ, being wholly unwarranted by any authority, if it is not to be considered as a mere nullity, we think must be set aside. There remains, therefore, only the second *distringas*, which, as we before observed, is subject to future consideration.

Now the objections to the writs of summons are these; first, it is objected

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to all of them that the defendant's place of residence, or supposed residence, is misdirected. It appears, however, that the place of her supposed residence mentioned in these writs, agrees with the place at which the promissory notes are dated, upon which the action is brought, and which was once the place of the defendant's true residence; and though it was also stated that she ceased to reside there, in 1833, it does not appear that any other place of her residence was brought home to the actual knowledge of the plaintiff, before these writs respectively were issued.

We think, therefore, that the plaintiff was authorized to treat the place mentioned in the promissory notes as the supposed residence of the defendant.

A second objection has been made to the *pluries* writ of summons, because it was issued before the *alias* was returned. The original writ was returned and filed before the *alias* was issued; and the *pluries* was issued within a month after the expiration of four months from the *teste* of the *alias*. A question, therefore, arises, whether it is material, in order that this writ should be a continuation of the *alias*, that the *alias* should have been returned or not. But as this is a point which may, if it becomes necessary, be determined in a more solemn manner, by putting the several writs of summons on the record, we forbear, at present, from expressing any opinion thereon.

Another objection has been raised, as to the regularity of the *alias* and *pluries* writs of summons, that they were issued and bear *teste* after the previous writs of summons, of which they were intended to be a continuation, had been suffered to expire. But, notwithstanding the cases which have been cited, in which this Court refused to allow the issue of writs of *distringas* after the lapse of four months from the *teste* of the summons, we think, upon consideration, that the plaintiff's right to continue writs of *distringas* thereupon by leave of the Court, or a judge, is not confined to the period during which the summons is in force. It is unnecessary, in the present case, to determine the extent of time within which this right may be exercised, the writs in question having been issued within one month from the expiration of the preceding writs.

It is further objected, that as this *alias pluries* was taken out, while a *distringas*, for the purpose of proceeding to outlawry, which had regularly issued in pursuance of a rule of Court, was actually current and in force; such writ of summons is irregular, and ought to be set aside; and there may be some difficulty in maintaining that a party, who, by leave of the Court, has been permitted to quash his own process to compel appearance, for the purpose of taking out process of outlawry, and has actually issued process of outlawry pursuant to the authority granted to him, can regularly resort to process to compel appearance in continuation of the course of proceeding which he has had leave to abandon, and carry on simultaneously process to compel appearance, and process to outlawry.

But, we think, it would be imposing upon a party who issues process, too strict a rule of practice, to determine that the issuing of the second writ of *distringas* on the 7th of *June*, which was never delivered to the sheriff, and upon which no proceedings whatever were taken, but which was altogether abandoned by the plaintiff himself, should be considered as an existing writ, for no other purpose than that of preventing the plaintiff from continuing his writs of summons; and, at all events, we think this second writ of *distringas* ought to be set aside, as the defendant has moved that it should be.

The consequence is, that all the writs of summons remain in force, and all the writs of *distringas* are to be set aside.

And we think there are circumstances in this case which make it unadvisable to give the costs to either party, but that they should be costs in the cause; the defendant's rule being made absolute, as to part, and the plaintiff's cross rule to amend the *teste* of the writ of *distringas*, which issued on the 25th day of *October* last, being discharged, as the *distringas* was issued altogether without any authority.

GIBSON *v.* Lord RANELAGH.

Service of rule to compute dispensed with, where defendant resided abroad, and had no place of residence here.

BARSTOW moved for a rule to compute upon a bill of exchange, and that service of the rule upon the defendant's general attornies, and sticking up a copy in the Master's office, might be deemed good service, upon an affidavit that the defendant was abroad, and had no place of residence in this country (*a*).

Rule granted.

(*a*) See *Warren* v. *Smith*, 2 D. P. C. 216; *Sealey* v. *Robertson*, Id. 568; *Payett* v. *Hill*, Id. 688; *Strutton* v. *Hawkes*, 3 D. P. C. 25; *Gardner* v. *Green*, Id. 343; *Chaffers* v. *Glover*, 5 D. P. C. 81; *Provis* v. *Cantley*, 1 H. & W. 369; *Black* v. *Cloup*, 2 H. & W. 297, 5 D. P. C. 270; *Salisbury* v. *Sweetheart*, 2 H. & W. 336, 5 D. P. C. 243; *Thomas* v. *Lord Ranelagh*, 2 H. & W. 336, 5 D. P. C. 258; *Carew* v. *Winslow*, W. W. & D. 218, 5 D. P. C. 543; *Howell* v. *Williams*, 1 W. W. & H. 585.

DOE, d. EMERY *v.* ROE.

Jan. 16.

Where there are several adjoining houses, and all the tenants have been personally served but one, who had left the premises, and a copy of the declaration had been fixed to the empty house, the Court granted a rule for judgment against the casual ejector.

JAMES moved for judgment against the casual ejector. There were several tenants of adjoining houses, all of whom had been served personally but one, who had left the premises, and it was not known where to find him; and the declaration had been fixed on the door of the house.

There had been conflicting decisions upon the subject; but in *Doe*, d. *Hindle* v. *Roe* (*a*), the Court of *Exchequer*, under precisely the same circumstances, granted the rule now prayed for, though at first they doubted whether the landlord ought not to proceed as in the case of a vacant possession.

Per Curiam.—On the authority of that case you may take your rule.

Rule granted (*b*).

(*a*) 3 M. & W. 279; 6 D. P. C. 393.

(*b*) *Doe*, d. *Osbaldiston* v. *Roe*, 1 D. P. C. 456, acc.; *Doe*, d. *Lord Darlington* v. *Cork*, 4 B. & C. 259; *Doe*, d. *Showell* v. *Roe*, 2 C. M. & R. 42; *Doe*, d. *Norman* v. *Roe*, 2 D. P. C. 399, 428; *Doe*, d. *Roupel* v. *Roe*, 1 H. & W. 367, cont. On a subsequent day in this Term, in a case of *Doe*, d. *Bancks* v. *Roe*, this Court granted a rule for judgment against the casual ejector, where there had been a personal service on *A.*, a party who had lately been lessee of all the premises, and was still in possession of part, and on *B.*, *C.* and *D.*, tenants in possession of other parts, and where the declaration had been fixed on the doors of eleven unoccupied tenements, the residue of the premises.

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The rule to reverse a judgment, where the requisitions of R. xiii., H. 4 W. 4, have not been complied with, is absolute, in the first instance.

TREVANION *v.* SARGON (in Error).

ARNOLD, on behalf of the plaintiff in error, moved to reverse a judgment of outlawry, twenty days having elapsed since the plaintiff in error had demanded a joinder in error; and the time not having been extended by judge's order: the only doubt was, whether the rule should be absolute in the first instance, under *R.* xiii., *H.* 4 *W.* 4.

Per Curiam.—It will be absolute in the first instance.

Rule accordingly (*a*).

(*a*) The rule orders that "No *scire facias ad audiendum errores* shall be necessary (unless in case of change of parties,) but the plaintiff in error may demand a joinder in error, or plea to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound, within twenty days, to deliver a joinder or plea, or to demur, *otherwise the judgment shall be reversed.*"

Before this and other rules relating to the same subject were made, the proceedings in error were extremely dilatory. The plaintiff in error, after the assignment of errors, if the defendant in error did not voluntarily appear and plead to the assignment (which, however, it was usual for him to do,) was obliged, in the *King's Bench*, to issue the writ of *scire facias ad audiendum errores*, and thereupon the plaintiff might move to reverse the judgment upon producing the record of the *scire facias* with the sheriff's return of *scire feci*, and an entry of the defendant's default, without taking out a rule to join in error. (See *Thatcher* v. *Stephenson*, 1 Str. 144.) But the *Exchequer* Chamber, not having the record before them, but only a transcript, did not award a *scire facias ad audiendum errores*, but *notice* was given to the parties concerned, 1 Vent. 34; Tidd. Pr. 1172, 3, 9th ed.

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In an action of account, charging the defendant as tenant in common with the plaintiff, of certain goods, *viz.*, as owner of one moiety, and as bailiffs to the plaintiff as to the other moiety; a plea, that the defendant rendered a reasonable account, is not satisfied by evidence that the defendant rendered an account in which he charged himself as factor to the plaintiffs for the whole.

Where an action of account, and all matters in difference, were referred to an arbitrator:—*Held*, that he was not limited to the functions of an auditor merely to find what was due between the parties, but that he was authorized to award the payment of the sum found due upon such an account.

THE following case was submitted to the Court.

This was an action of *account*, brought by the plaintiffs as surviving partners of *John Collier* and *John Baxter*, deceased. The declaration stated, that on the 9th *October*, 1827, the plaintiffs, together with the said *J. C.* and *J. B.*, deceased, and the defendant, were owners of divers goods and chattels, to wit, fifteen cases of linens, called *platillas*, containing a large quantity, to wit, &c., of the value of 500*l.*, to wit, as tenants in common thereof, and which said goods and chattels, so being the property of the plaintiffs, and *J. C.* and *J. B.* and the defendant, as aforesaid, heretofore, to wit, on the day and year aforesaid, and thence for a long time afterwards, to wit, until the 30th *June*, 1830, were in the care and management of the defendant, and were held by him, to wit, as the owner of the one undivided moiety thereof, and as the bailiff of the plaintiffs and *J. C.* and *J. B.*, of the other undivided moiety thereof, to be merchandized and made profit of for the plaintiffs and *J. C.* and *J. B.*, or the survivors of them, and the defendant, according to their respective interests therein, as aforesaid. And the defendant was thereupon to render a reasonable account thereof to the plaintiffs and *J. C.* and *J. B.*, or the survivors of them, when he should be thereto afterwards requested. And although the defendant afterwards, to wit, on the day and year last aforesaid, in the lifetime of *J. C.* and *J. B.*, sold and disposed of the same for and on account of him the defendant, and the plaintiffs and *J. C.* and *J. B.*; and although the plaintiffs and *J. C.* and *J. B.*, in their lifetime, afterwards, to wit, on the day and year last aforesaid, requested the defendant to render a reasonable account of the said goods and merchandizes and of the proceeds and profits thereof, and the defendant was also afterwards, and after the death of *J. C.* and *J. B.*, to wit, on the 1st *January*, 1835, requested by the plaintiffs so to do, yet the defendant hath not yet rendered the said reasonable account of the said goods and merchandizes, or of the proceeds and profits thereof, either to the plaintiffs and the said *J. C.* and *J. B.*, or any of them, in the lifetime of *J. C.* and *J. B.*, or to the plaintiffs, or either of them, since the death of *J. C.* and *J. B.*, but hath hitherto wholly refused and neglected so to do, contrary to the form of the Statute in such case made and provided.

[There were three other counts, similar to the first, but on other consignments.]

Pleas: first (to the two first counts), that the plaintiffs, together with *J. C.* and *J. B.*, deceased, and the defendant, were not ever owners of the said goods and chattels in those counts mentioned, or of any part thereof, in manner and form, &c.

Second (to the same), that the said goods and chattels, in those counts mentioned, were not, nor was any part thereof, ever in the care or management of, or held by him the defendant, to wit, as the owner of the one undivided moiety thereof, and as the bailiff of the plaintiffs and *J. C.* and *J. B.*, deceased, of the other undivided moiety thereof, in manner and form, &c.

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Third (to the same), that the defendant did not sell or dispose of the said goods and chattels, in those counts mentioned, or any part thereof, in manner and form, &c.

Fourth (to the same), that long before the commencement of this action, and after the said selling and disposing of the said goods and chattels, in those counts respectively mentioned, and in the lifetime of *J. C.* and *J. B.*, deceased, to wit, on the 1st of *January*, 1830, the defendant did render to the plaintiffs, and *J. C.* and *J. B.*, deceased, a reasonable account of the said goods and merchandizes, in those counts mentioned, and of the proceeds and profits thereof.

Fifth (to the same), that before the commencement of this action, and after the said selling and disposing of the said goods and chattels, in those counts respectively mentioned, to wit, on the 1st *January*, 1836, he the defendant did render to the plaintiffs a reasonable account of the said goods and chattels last mentioned, and of the proceeds and profits thereof.

And as to the two last counts of the declaration, the defendant says nothing in bar of the said plaintiffs' action, in respect of the matters in those counts contained; and he the defendant now here offers himself, and is ready and willing to render to the said plaintiffs such reasonable account, as in those counts respectively mentioned, when and where, and in such manner and form as the Court here shall award.

Replication, joining issue on the pleas.

Judgment by *nil dicit* as to the two last counts, forasmuch as the defendant says nothing in bar or preclusion of the action of the plaintiffs, in respect of the matters in those counts contained, whereby the plaintiffs remain therein undefended against the defendant, therefore it is considered that the defendant do account with the plaintiffs for the time he was bailiff of the plaintiffs, and had the care and management and administration of the goods and chattels in those counts respectively mentioned, to be merchandized and made profit of for the plaintiffs, as in those counts respectively alleged; and the defendant in mercy, because he hath not before accounted, &c.

The cause came on for trial before *Tindal*, C. J., at the *London* Sittings after *Michaelmas Term*, 1836, when a verdict was entered for the plaintiffs on all the issues, subject to the award of a barrister, who was by the order of reference empowered to direct that a verdict should be entered for the plaintiffs or defendant, and such judgment thereon for either of the said parties as he should think proper, and to whom the cause, and all matters in difference between the parties, were referred, and who was to raise upon the face of his award any points of law, if any should occur, for the opinion of the Court; the plaintiffs to have the right to apply to the said Court for leave to amend the record, and the Court to have the same right to grant or refuse such amendment as the C. J. at *Nisi Prius* would have had.

The arbitrator made his award on the 10th of *January*, 1838, and awarded, that, upon the first issue, the plaintiffs and *J. C.* and *J. B.*, deceased, and the defendant, were owners of the said goods and chattels, in manner and form following, that is to say, the plaintiffs, together with *J. C.* and *J. B.*, were, during the time that the said goods and chattels were in the care and management of the defendant, joint owners of one undivided moiety of the said goods and chattels, and as such joint owners of the said undivided moiety, were,

during all the time aforesaid, tenants in common with the defendant and one *George Atkinson* of the said goods and chattels, the defendant and *G. A.* then being joint owners of another undivided moiety of the said goods and chattels.

Upon the second issue; that the goods and chattels were in the care and management of and held by the defendant, as the owner, jointly with *G. A.*, of the one undivided moiety thereof, and as the bailiff, jointly with *G. A.*, of the plaintiffs and *J. C.* and *J. B.*, deceased, of the other undivided moiety thereof.

Upon the third issue; that the defendant did sell and dispose of the said goods and chattels for and on account of the defendant and *G. A.* as to one undivided moiety thereof, and for and on account of the plaintiffs and *J. C.* and *J. B.*, as to another undivided moiety thereof.

Upon the fourth issue; that the said goods and chattels were manufactured by the plaintiffs and by *J. C.* and *J. B.*, in *Scotland*, and were afterwards forwarded by them to the defendant and *G. A*, in *Jamaica*, to be there sold by the defendant and *G. A.* on the joint account of the plaintiffs and *J. C.* and *J. B.*, and of the defendant and *G. A.*, in such proportions as before stated with reference to the third issue; and were then by the defendant and *G. A.* accepted, to be by them there sold on such joint account, and in such proportions as aforesaid. And that afterwards, and before the commencement of the suit, and after such selling and disposing of the said goods and chattels, as before found with reference to the third issue, and in the lifetime of the said *J. C.* and *J. B.*, the defendant did render to the plaintiffs and *J. C.* and *J. B.*, deceased, a certain account, as and for a reasonable account of the said goods and chattels in those counts mentioned, and of the proceeds and profits thereof, which account contained a statement of the prices obtained by the defendant upon the sale of the last mentioned goods and chattels, and also an account of the charges upon such goods and chattels, made out by the defendant in the ordinary form of account sales rendered by a factor, to whom goods are consigned for sale, to his principal the consignor, and taking credit for the whole of the charges incident to the sale of the said goods and chattels, including a commission of ten *per cent.* upon such sales, and without noticing any interest of the defendant, or of the defendant jointly with *G. A.*, in the said goods and chattels, or in the undivided moiety thereof, and without bringing into the account, or in any manner noticing, a certain loss upon the said consignment, resulting from the fact that the said last mentioned goods and chattels were sold by the defendant at less prices, and for a smaller amount, than the amount of the invoice value or prime cost thereof, with the charges thereon. And that no account of the said last mentioned goods and chattels, and of the proceeds and profits thereof, save and except such account as above mentioned, was ever rendered by the defendant and *G. A.*, or either of them, to the plaintiffs and *J. C.* and *J. B.*, deceased, or to any of them. And further, that before the commencement of the action, the defendant and *G. A.* paid to the plaintiffs and *J. C.* and *J. B.* the full amount of the price obtained by the defendant and *G. A.* upon the sale of the said goods and chattels, after deducting their charges and commission, but that they have not paid to the plaintiffs and *J. C.* and *J. B.* or to any of them, any part of the said loss.

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Upon the fifth issue, the award was the same as upon the fourth, *mutatis mutandis*; and upon all the issues, the arbitrator directed a verdict for the plaintiff, subject to the opinion of the Court.

The award then proceeded upon the question of interest, and found that by the course of dealings, the defendant was to pay interest according to the *Jamaica* rate, and awarded that he should so pay it accordingly.

The questions for the opinion of the Court were;

First, whether the verdict should be entered up for the plaintiffs on all the issues, and a judgment "*quod computet*" be entered against the defendant thereon, in manner directed by the arbitrator; or whether a verdict should be entered for the defendant upon all, or some, and which of the issues.

Secondly, whether final judgment should or should not be entered for the plaintiffs, as directed by the arbitrator, in respect of all, or some, and which of the said counts in the declaration. And if final judgment was to be so entered, whether the same should be entered for all the several sums in which the arbitrator had found that the defendant was indebted to the plaintiffs, at the time of making his award, or for any, and which of them, or for any, and what other sums or sum of money.

The marginal note was as follows:—

The questions in this case are, whether a verdict shall be entered for the plaintiffs, according to the award of the arbitrator, and upon the grounds in the award, set forth in the first, second, third, fourth and fifth issues raised upon the pleadings; and whether a judgment *quod computet* shall be entered against the defendant upon these issues, pursuant to such verdict. And also, whether final judgment shall be entered up for the plaintiffs, in the manner, and for the different sums set forth in the award, the plaintiffs contending that they are entitled to the whole benefit of the award, in the manner and for the reasons therein set forth; the property in the goods, which were the subject of this action, having been found to be as alleged in the declaration, and the defendant having sold and disposed of those goods, as in the declaration also stated, and being liable to the plaintiffs for the proceeds and value thereof, as appears by the award.

The defendant proposes to argue; *first*, that the first issue should have been found for him, inasmuch as it appears by the award that the plaintiffs, together with *J. C.* and *J. B.*, deceased, and the defendant, were not owners of the goods mentioned in the two first counts, *modo et forma*, &c.

Secondly, that the second issue should also have been found for the defendant, inasmuch as it appears by the award that the goods in the first and second counts mentioned were not in the care and management of, or held by, the defendant, as owner of one undivided moiety thereof, and as bailiff of the plaintiffs and of *J. C.* and *J. B.*, of the other undivided moiety thereof, *modo et forma*, &c: but that the same were in the care and management of, and were held by the defendant, as owner, jointly with *G. A.*, of one undivided moiety thereof, and as bailiff, jointly with *G. A.*, of the other undivided moiety thereof.

Thirdly, that the fourth and fifth issues should have been found for the defendant, inasmuch as (under the circumstances stated by the arbitrator) it appears that the defendant did render to the plaintiffs and to *J. C.* and *J. B.*,

in their lifetime, and also to the plaintiffs, since their death, a reasonable account of the goods mentioned in the two first counts, and of the proceeds and profits thereof.

Fourthly, that upon taking the account between the parties, final judgment ought to have been entered for the defendant, inasmuch as it appears by the award that he had, before action brought, paid all the proceeds of the goods to the plaintiffs, and to *J. C.* and *J. B.*

Fifthly, that the defendant ought not, in taking the account, to have been charged with any interest; and, at all events, such interest should only have been charged at the rate of 5 *per cent.*, and only calculated down to the time of the commencement of the action.

The case was argued in last *Michaelmas Term*, 1838, by

W. H. Watson for the plaintiff, and *F. Robinson* for the defendant; and the following authorities were cited;

41 *E.* 3. 3 b.; 2 *H.* 4. 12 b.; 11 *H.* 4. 79; *Bro. Abr.* "Accompt," pl. 53; *Roll. Abr.* "Account," O. 20, 21; *Vin. Abr.* same title, and C. pl. 9; E. 2, pl. 2; H.; *Com. Dig*, "Accompt," E. 2; 6 *F. N. B.* "Writ of Account;" *Co. Lit.* 89, 90 b. 172 a. 200, b.; 2 *Inst.* 279; *Rast.* 19; *Brownl. Rep.* 25, n.; 2 *Mod.* 100; 3 *Bl. Com.* 163; *Lord Suffolk* v. *Floyd* (2 Rol. Rep. 87); *Vere* v. *Smith* (2 Lev. 5, 1 Ventr. 121); *Wheeler* v. *Horne* (Willes, 208); *Tomkins* v. *Willshear* (5 Taunt. 431); *Harvey* v. *Archbold* (3 B. & C. 626, 5 D. & R. 500, Ry. & Moo. 184); *Scott* v. *Bevan* (2 B. & Ad. 78).

It was admitted, on the part of the defendant, that the non-joinder of *George Atkinson*, as a defendant, could only be taken advantage of by plea in abatement.

Cur. adv. vult.

TINDAL, C. J., now delivered judgment.—The first question referred to us upon the award made in this case is, whether the verdict shall be entered upon all the issues for the plaintiffs, or upon any, and which of them, for the defendant The second is, whether final judgment shall be entered for the plaintiffs in respect of all, or which of the counts in the declaration, and if so, for what sum or sums.

As to the first question, the only issues upon which any doubt can arise as to the party in whose favour the verdict ought to be entered, are the issues raised upon the fourth and fifth pleas; on all the other issues the plaintiffs are, upon the facts found in the award, clearly entitled to the verdict. The issues in question arise upon traverses taken to the fourth and fifth pleas, which virtually involve the same inquiry; namely, whether, before the action was brought, the defendant did render to the plaintiffs *a reasonable account* of the goods and merchandizes in the first and second counts mentioned, and of the proceeds and profits thereof. And in order to determine in favour of which of the two parties this issue ought to be found, it will be necessary, in the first place, to ascertain the precise legal meaning of the traverse itself.

The plea, although in form the traverse of an allegation in the count, cannot be distinguished in its legal construction and operation from the plea,

well known and established in law as a bar to an action of account; namely, "that the defendant hath fully accounted with the plaintiff himself." It is a good plea, in an action of account, as laid down in *F. N. B.* 117, D. note (d), that the defendant has accounted before auditors assigned by the plaintiff, or that he has accounted before the plaintiff himself; and the reason given is, that after such account made, the action of account is gone, and the plaintiff may have an action of debt on the arrear or balance. (See also *Bro. Abr.* "Accompt," pl. 28, 67.) And again, it is laid down in the case of *Godfrey* v. *Saunders* (3 Wils. 113), that "where the party is once chargeable or accountable, he cannot plead in bar, except in case of a release or *plenè computavit*, but must go before auditors: these exceptions are, because a release, and having fully accounted, are total extinctions of the right of action." From which authorities the inference is, that unless the plea amounts to a plea of *plenè computavit*, inasmuch as it admits that the defendant is chargeable and accountable, there must be a judgment *quod computet*. The question therefore necessarily arises, what is such an accounting with the plaintiff as will satisfy this plea?

And we think the accounting, which is necessary to satisfy this allegation, may be inferred from the passage in *Fitzherbert*, already cited, and the authorities there referred to from the *Year-Books* (viz., 7 *H.* 4, 14, and 34 *H.* 6, 43), to be *the rendering an account to the satisfaction of the plaintiff*, or an account which shews *an agreed balance between the plaintiff and the defendant;* for nothing short of this would be sufficient to alter the nature of the demand, and to give the plaintiff an action of debt for the arrears or balance. And again, in the case in the *Year-Books* last referred to, where the plea was that the defendant "after the receipt of the monies, and before the writ purchased, himself accounted, together with the plaintiff, of the same monies;" and it was objected, that the plea was bad, because a man cannot be judge in his own cause; the answer given was, "that, by mutual consent, he may." And, indeed, it is obvious, that if the mere fact of rendering a true account to the plaintiff, though not agreed to by him, were sufficient to bar the action, a defendant, by pleading *plenè computavit*, might always defeat the object of the action of account, which is to obtain an investigation before the auditors, and might insist that the truth of the whole account rendered was a question to be decided before the jury at *Nisi Prius*.

And still further, as the plea of accounting before the plaintiff himself is just upon the same footing as an accounting before auditors appointed by the plaintiff, and it is clear that the defendant in the latter case must account to their satisfaction, we hold ourselves warranted in saying, that the plea put in by the defendant on this occasion, that he has rendered to the plaintiffs a reasonable account, is not made out in his favour, unless he can shew that the account so rendered was one of that description, that the result was a balance ascertained and agreed upon between the parties. Now, upon the evidence before the arbitrator, it is manifest that the account rendered by the defendant was not an account to which the plaintiffs ever agreed; but on the contrary, that whilst the defendant rendered an account in which he charged himself as factor for the whole, the plaintiffs insisted that he ought to render an account in which he should be chargeable as a factor for one moiety only, and as owner of the other, and thereby make himself liable to a moiety of the

losses arising from the sale of the whole. It appears, therefore, to us, that the issue upon the fourth and fifth pleas must be found for the plaintiffs, and that they are entitled to judgment against the defendant "*quod computet*" generally, upon the whole declaration.

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The remaining question referred to us is, upon what counts in the declaration the plaintiffs are entitled to final judgment, and for what sum. And upon this latter question we think, that although difficulties might have arisen as to the mode of taking the account, resulting from the form of the declaration, and the character in which the defendant stands charged thereby, in case the account had been taken before auditors assigned by the Court, under the judgment *quod computet*, yet under the power given to the arbitrator by consent of the parties, such difficulties are removed; and that it was intended by the order of the Court, and the consent of the parties, that when the arbitrator, after hearing the evidence, decided that the defendant should account, he, the arbitrator, should take the account between the parties as it really stood, and ought to be taken between them, with reference to their real and true relation to each other; in short, that he was to sit as an arbitrator, to whom all matters in difference between the parties were referred, and not simply as an auditor, assigned under the common law judgment, *quod computet*, notwithstanding the judgment was ultimately to be entered up in the action. And, in this view, we think the account has been rightly taken by the arbitrator, and that the judgment should be entered upon the first and second counts, which were traversed, for the aggregate sums found by him to be due thereon for principal and interest, at 6 *per cent.*; and upon the fourth and fifth counts, on which judgment went by default, for the aggregate of the principal sum and interest, at the rate above mentioned, as stated by the arbitrator. And we give judgment accordingly.

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Jan. 31.

THESIGER, in *Michaelmas Term*, obtained a rule *nisi* to sign and enter up final judgment against the defendant for 620*l.* 15*s.* 10*d.*, under the Speaker's certificate, pursuant to the Statute 9 *G.* 4, c. 22, s. 63 (*a*). The affidavits he produced were to the following effect:

1. Judgment may be entered up against one of several parties, mentioned in the Speaker's certificate, as liable to pay the costs of an election petition (under 9 G. 4, c. 22, s. 63,) for the whole amount of such costs, even though actions have been commenced against all the other parties.

2. The above Statute, which gives authority to the Speaker so to certify, is not a penal enactment.

3. The application to the Speaker, to appoint the taxation, may be made by the agent of the party in whose favour the committee have reported.

4. It is no objection to the certificate that the name of the party, entitled to the costs, appears for the first time therein, the name of *A. B.* being inserted in the former documents, if it sufficiently appears from affidavits that *A. B.* was the agent of such party.

5. As the certificate is, by the Statute, conclusive as to the amount of the costs, it is no objection that, in a certificate in favour of a sitting member, the costs of an elector, admitted to defend the return, are included.

(*a*) Sec. 57 enacts, "That whenever any committee, appointed to consider the merits of any petition, complaining of an undue election or return, shall report to the House, with respect to any such petition, that the same appeared to be frivolous or vexatious, the parties who shall have appeared before the committee in opposition to such petition, shall be entitled to recover from the persons, or any of them, who shall have signed such petition, the full costs

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That the speaker of the House of Commons had duly signed the following certificate:—

"Whereas *John Rickman*, Esq., clerk assistant of the House of Commons, and *James William Farrer*, Esq., one of the masters of the *High Court of Chancery*, who were duly authorized and directed by me in pursuance of an Act passed in the ninth year of the reign of his majesty king *George* 4th, intituled, 'An Act to consolidate and amend the law relating to the trial of controverted elections or petitions of members to serve in Parliament,' to examine and tax the costs and the expences incurred by *John Minet Fector*, Esq., sitting member for the borough of *Maidstone*, have reported to me the amount thereof, and do hereby certify that the costs and expences allowed in the said report amount to the sum of 620*l.* 15*s.* 10*d.*, and that *George Beacon*, *George Powell*, *William Lucking Wright*, *William Jury*, *Walter Harris* and *William Richard Brown*, who signed the petition, complaining of an undue election and return for the said borough, declared by the select committee, appointed to try the merits of the said petition, to be frivolous and vexatious, are liable to pay the same.

"Given under my hand, this 6th day of *August*, 1838.

"*J. Abercromby*, Speaker."

and expences which such parties shall have incurred in opposing the same; such costs and expences to be ascertained in the manner hereinafter directed."

Sec. 60 enacts, "That the costs and expences of prosecuting or opposing any petition, presented under the provisions of this Act, and the costs and fees payable to any witness summoned before such committee, or to any clerk or officer of the House of Commons, upon the trial of any such petition, shall be ascertained in manner following; that, on application made to the Speaker within three months after the determination of the merits of such petition, by any such petitioner, party, witness or officer, as before mentioned, for ascertaining such costs or fees, the Speaker shall direct the same to be taxed by two persons, of whom the clerk, or one of the clerks' assistant of the House, shall always be one, and one of the following officers, not being a member of the House, shall be the other; (that is to say) masters in *Chancery*, the *King's Bench*, *Common Pleas* and *Exchequer*; and the persons so authorized to tax such costs and fees shall examine the same, report the amount thereof, together with the name of the party liable to pay the same, to the Speaker, who shall, upon application, deliver to the party a certificate signed by himself, expressing the amount of the costs and fees allowed in such report, together with the name of the party liable to pay the same; and the persons so appointed to tax such costs and fees, and report the amount thereof, are authorized to receive, for such taxation and report, such fees as shall be, from time to time, fixed by resolution of the House; and such certificate, so signed by the Speaker, shall be conclusive evidence of the amount of such demands, in all cases, and for all purposes, whatsoever; and the party, claiming under the same, shall, upon payment thereof, give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same."

Sec. 63 enacts, "that it shall be lawful for the party entitled to such costs to demand the whole amount thereof, so certified as above, from any one or more of the persons respectively, who are hereinbefore made liable to the payment thereof; and in case of non-payment, to recover the same by action of debt in any of His Majesty's Courts of record at *Westminster*, in which action it shall be sufficient for the plaintiff to declare that the defendant is indebted to him in the sum to which the costs, ascertained in manner aforesaid, shall amount by virtue of this Act; and the certificate of such amount, so signed by the Speaker, shall have the force and effect of a warrant to confess judgment; and the Court, in which such action shall be commenced, shall, upon motion, and on the production of such certificate, enter up judgment in favour of the plaintiff named in such certificate, for the sum specified therein to be due from the defendant in such action, in like manner as if the defendant had signed a warrant to confess judgment in the said action to that amount."

That the plaintiff, by deed-poll, had appointed Mr. *Richard Hart*, his attorney, to demand and receive the sum mentioned in the certificate from the persons named therein, and each of them: that the defendant was served by *Hart* with a copy of the certificate and deed-poll, and the originals shewn to him, and payment demanded of 620*l.* 15*s.* 10*d.*, but which sum was not paid, either by the defendant or any other person: that a writ of summons, in debt for 620*l.* 15*s.* 10*d.*, was sued out in *September*, 1838, against the defendant, and personally served upon him, duly indorsed with Mr. *Hart's* name and place of abode as such attorney: that the defendant not having appeared, an appearance was entered for him in *October*, by *Bower* and *Back*, *Hart's* agents; and soon afterwards, Mr. *James Coppock* gave notice that he was the defendant's attorney, and would receive a declaration: that a copy of the declaration in debt, upon the Statute, was delivered to *Coppock*, in *November*, and a duplicate filed at the Master's office: and that the day after the declaration was filed, the defendant was served with notice thereof, and with a copy of the particulars of the plaintiff's demand.

Wilde, Serjt., and *Cockburn*, shewed cause, upon an affidavit by Mr. *Coppock*, as follows:—

That the following notice was served on Mr. *Northouse*, parliamentary agent for the petitioners:—

"*Maidstone* borough: We the examiners appointed to tax the costs and expences of Mr. *Hart*, in the matter of the above election, have appointed *Thursday*, the 2d day of *August*, at 4 o'clock in the afternoon, in one of the committee rooms of the House of Commons. *J. W. Farrer; W. G. Rose*, clerk to the taxation. House of Commons, *July* 30th, 1838."

That the deponent having, in the absence of Mr. *Northouse*, undertaken to attend to such taxation, went first to the office of Mr. *Rose*, clerk to the recognizances on election petitions, and clerk to the taxation of costs, at the offices of the House of Commons, in *Parliament Street*, and there inspected the original application for taxation, previous to the appointment to tax.

That such application, upon which the appointment to tax had proceeded, was as follows:—

"Sir, in pursuance of the Act 9 *G.* 4, c. 22, we are directed to transmit to you a copy of Mr. *Hart's* account against the petitioners in the *Maidstone* election, and to request you to have the same taxed in the usual way. We are, sir, your obedient humble servants, *Bower* and *Back*, 46, *Chancery Lane*, 27th *July*, 1838. To the right honourable the Speaker of the House of Commons."

That, annexed to the application above set forth, was an appointment, signed by the Speaker, as follows:—

"By virtue of the powers given to the Speaker of the House of Commons, by an Act passed in the 9th year of the reign of his majesty king *George* the 4th, I do hereby nominate and appoint *John Rickman*, Esq., clerk assistant to the House of Commons, and *James W. Farrer*, Esq., one of the masters of the *High Court of Chancery*, to examine and tax the costs and expences mentioned in the requisition hereunto annexed; and the said *J. Rickman*

Third (to the same), that the defendant did not sell or dispose of the said goods and chattels, in those counts mentioned, or any part thereof, in manner and form, &c.

Fourth (to the same), that long before the commencement of this action, and after the said selling and disposing of the said goods and chattels, in those counts respectively mentioned, and in the lifetime of *J. C.* and *J. B.*, deceased, to wit, on the 1st of *January*, 1830, the defendant did render to the plaintiffs, and *J. C.* and *J. B.*, deceased, a reasonable account of the said goods and merchandizes, in those counts mentioned, and of the proceeds and profits thereof.

Fifth (to the same), that before the commencement of this action, and after the said selling and disposing of the said goods and chattels, in those counts respectively mentioned, to wit, on the 1st *January*, 1836, he the defendant did render to the plaintiffs a reasonable account of the said goods and chattels last mentioned, and of the proceeds and profits thereof.

And as to the two last counts of the declaration, the defendant says nothing in bar of the said plaintiffs' action, in respect of the matters in those counts contained; and he the defendant now here offers himself, and is ready and willing to render to the said plaintiffs such reasonable account, as in those counts respectively mentioned, when and where, and in such manner and form as the Court here shall award.

Replication, joining issue on the pleas.

Judgment by *nil dicit* as to the two last counts, forasmuch as the defendant says nothing in bar or preclusion of the action of the plaintiffs, in respect of the matters in those counts contained, whereby the plaintiffs remain therein undefended against the defendant, therefore it is considered that the defendant do account with the plaintiffs for the time he was bailiff of the plaintiffs, and had the care and management and administration of the goods and chattels in those counts respectively mentioned, to be merchandized and made profit of for the plaintiffs, as in those counts respectively alleged; and the defendant in mercy, because he hath not before accounted, &c.

The cause came on for trial before *Tindal*, C. J., at the *London* Sittings after *Michaelmas Term*, 1836, when a verdict was entered for the plaintiffs on all the issues, subject to the award of a barrister, who was by the order of reference empowered to direct that a verdict should be entered for the plaintiffs or defendant, and such judgment thereon for either of the said parties as he should think proper, and to whom the cause, and all matters in difference between the parties, were referred, and who was to raise upon the face of his award any points of law, if any should occur, for the opinion of the Court; the plaintiffs to have the right to apply to the said Court for leave to amend the record, and the Court to have the same right to grant or refuse such amendment as the C. J. at *Nisi Prius* would have had.

The arbitrator made his award on the 10th of *January*, 1838, and awarded, that, upon the first issue, the plaintiffs and *J. C.* and *J. B.*, deceased, and the defendant, were owners of the said goods and chattels, in manner and form following, that is to say, the plaintiffs, together with *J. C.* and *J. B.*, were, during the time that the said goods and chattels were in the care and management of the defendant, joint owners of one undivided moiety of the said goods and chattels, and as such joint owners of the said undivided moiety, were,

during all the time aforesaid, tenants in common with the defendant and one *George Atkinson* of the said goods and chattels, the defendant and *G. A.* then being joint owners of another undivided moiety of the said goods and chattels.

Upon the second issue; that the goods and chattels were in the care and management of and held by the defendant, as the owner, jointly with *G. A.*, of the one undivided moiety thereof, and as the bailiff, jointly with *G. A.*, of the plaintiffs and *J. C.* and *J. B.*, deceased, of the other undivided moiety thereof.

Upon the third issue; that the defendant did sell and dispose of the said goods and chattels for and on account of the defendant and *G. A.* as to one undivided moiety thereof, and for and on account of the plaintiffs and *J. C.* and *J. B.*, as to another undivided moiety thereof.

Upon the fourth issue; that the said goods and chattels were manufactured by the plaintiffs and by *J. C.* and *J. B.*, in *Scotland*, and were afterwards forwarded by them to the defendant and *G. A*, in *Jamaica*, to be there sold by the defendant and *G. A.* on the joint account of the plaintiffs and *J. C.* and *J. B.*, and of the defendant and *G. A.*, in such proportions as before stated with reference to the third issue; and were then by the defendant and *G. A.* accepted, to be by them there sold on such joint account, and in such proportions as aforesaid. And that afterwards, and before the commencement of the suit, and after such selling and disposing of the said goods and chattels, as before found with reference to the third issue, and in the lifetime of the said *J. C.* and *J. B.*, the defendant did render to the plaintiffs and *J. C.* and *J. B.*, deceased, a certain account, as and for a reasonable account of the said goods and chattels in those counts mentioned, and of the proceeds and profits thereof, which account contained a statement of the prices obtained by the defendant upon the sale of the last mentioned goods and chattels, and also an account of the charges upon such goods and chattels, made out by the defendant in the ordinary form of account sales rendered by a factor, to whom goods are consigned for sale, to his principal the consignor, and taking credit for the whole of the charges incident to the sale of the said goods and chattels, including a commission of ten *per cent.* upon such sales, and without noticing any interest of the defendant, or of the defendant jointly with *G. A.*, in the said goods and chattels, or in the undivided moiety thereof, and without bringing into the account, or in any manner noticing, a certain loss upon the said consignment, resulting from the fact that the said last mentioned goods and chattels were sold by the defendant at less prices, and for a smaller amount, than the amount of the invoice value or prime cost thereof, with the charges thereon. And that no account of the said last mentioned goods and chattels, and of the proceeds and profits thereof, save and except such account as above mentioned, was ever rendered by the defendant and *G. A.*, or either of them, to the plaintiffs and *J. C.* and *J. B.*, deceased, or to any of them. And further, that before the commencement of the action, the defendant and *G. A.* paid to the plaintiffs and *J. C.* and *J. B.* the full amount of the price obtained by the defendant and *G. A.* upon the sale of the said goods and chattels, after deducting their charges and commission, but that they have not paid to the plaintiffs and *J. C.* and *J. B.* or to any of them, any part of the said loss.

Common Pleas.

FECTOR v. BEACON.

had not been properly put in motion: the application should have been made by the party entitled to the costs, as where a penalty is given as a compensation to a party, the information must originate with him; and it is not sufficient that this should be so stated in the conviction; but it must also be embodied in the information, and established by proof; *Rex* v. *Daman* (*g*), *Rex* v. *T. Smith* (*h*). Now, in this case, the Court will not intend that *Hart* was the plaintiff's agent; if he were, the application for the appointment to tax should have been made by him, *quâ* agent; but the application was, in fact, not made by him at all, but by Messrs. *Bower* and *Back*, on his behalf; and, therefore, even upon the assumption that *Hart* was the plaintiff's agent, he had no power to depute his authority, pursuant to the maxim, *delegatus non potest delegare*. In *Bruyeres* v. *Halcomb* (*i*), the Court held that the Speaker's certificate was not conclusive, for they would not enter up judgment upon it, as it appeared by affidavit that it was founded upon the report of a select committee not duly appointed: and in *Ranson* v. *Dundas* (*j*), the Court took a distinction between matters of substance and matters of mere direction.

Secondly, the costs taxed contain the costs of several distinct parties, one being an elector (*Benstead*), whose name is not mentioned in the bill; and the Speaker had no authority to include these costs in the certificate, *Strachey* v. *Turley* (*k*).

Thirdly, by the terms of the certificate, the defendant, and five other persons, are declared liable to pay the costs, and six actions have consequently been brought; but judgment is now asked for the whole amount against one party only. It is true the 63d section says that the party, entitled to the costs, may demand the whole amount from any one or more of the persons liable; and in *Gurney* v. *Gordon* (*l*), it was held, that the certificate might be made against one of several petitioners; but here, both the report and the certificate are against all the parties; and, as the Act declares that the latter is to have the effect of a warrant of attorney, the certificate, in this case, will have the effect of a joint warrant of attorney, signed by all the parties, without words of severance, upon which a separate judgment cannot be entered up; *Raw* v. *Alderson* (*m*), *Gee* v. *Lane* (*n*).

Thesiger, Q. C., and *Channell*, in support of the rule.—The principle as to summary convictions does not apply to this case; for this Statute is not in the nature of a penal enactment, but merely points out the manner in which costs incurred in a judicial investigation are to be ascertained and recovered. Every thing which is requisite to entitle the plaintiff to his costs, appears in this case; and it is perfectly immaterial by whom the application to tax the costs was made; or, if the Court should think it material, it sufficiently appears upon the affidavits that *Hart* was the plaintiff's agent in the matter.

With regard to *Benstead's* costs, no objection can now be taken, as the

(*g*) 2 B. & A. 378.
(*h*) 5 M. & S. 133.
(*i*) 1 H. & W. 410; 3 A. & E. 381; 5 N. & M. 149.
(*j*) 2 Hodg. 155; 3 N. C. 123; 3 Sc. 429; 5 D. P. C. 489.
(*k*) 7 East, 507; 11 East, 194.
(*l*) 9 Bing. 37; 2 Mo. & Sc. 187; 2 C. & J. 614; 2 Tyr. 616.
(*m*) 7 Taunt. 453.
(*n*) 15 East, 592.

Statute is express that the certificate shall be conclusive evidence as to the amount of the costs, for all purposes whatever; and it is clear, that as *Benstead* was admitted to defend the plaintiff's return, that the costs were incurred in the same cause. *Strachey* v. *Turley* is very different from the present case; for that was the case, not of a party petitioned against, but of two petitioners, who might have proceeded upon wholly distinct grounds. *Gurney* v. *Gordon* is an authority that an action lies upon the certificate against one of the several petitioners. It might be an answer to this application, if it could be shewn that the plaintiff had actually recovered against any other of the parties mentioned in the certificate, but no such matter is even suggested.

Cur. adv. vult.

TINDAL, C. J, now delivered judgment.—Upon shewing cause against the rule granted in this case, for signing and entering up final judgment for the sum specified on the certificate of the Speaker of the House of Commons, in pursuance of the Stat. 9 *G.* 4, c. 22, three objections have been urged on the part of the defendant against the plaintiff's right to recover his costs: first, that upon the facts brought before the Court by the affidavits, the Speaker had no jurisdiction to grant his certificate; secondly, that the certificate includes the costs of another petitioner, besides those of the plaintiff; and, lastly, that the action should have been a joint action against all the petitioners, not a several action against each.

With respect to the objection lastly taken, we think it might have been entitled to much consideration, if the plaintiff had already entered up his judgment in another action against any one of the parties made liable to the costs; for that would have raised the question, whether more than one action can be maintained under the Statute, where several parties are made liable to the costs; but as no application has yet been made by the plaintiff in any other action, and it does not appear that any other will be made, the only question at present before us is, whether a several action is maintainable against one of such parties only. And we think that, under the construction of the 63d sec., it is at all events in the election of the party who is entitled to his costs under the Speaker's certificate, to demand them of any one of the persons made liable by the certificate, and to bring his action against such one alone.

In support of the two former objections, it has been urged, in the first place, on the part of the defendant, that the several clauses of the Statute, which give authority to the Speaker to ascertain and certify the costs, are to be considered as, and to receive the same strict construction with, clauses in an Act of Parliament which impose a penalty, so that no intendment is to be made in favour of the Speaker's jurisdiction; but, on the contrary, such jurisdiction must appear expressly, and with entire certainty, upon the face of the proceedings themselves. But we cannot consider the authority given by this Statute to the Speaker as having any connection with, or bearing any analogy to, a penal enactment. Even admitting that the clauses which give to the committee, appointed to consider the merits of a petition, the power of reporting that such petition, or the opposition thereto, is frivolous and vexatious, and which impose, as the consequence of such report, the payment of the full costs and expences of the adverse party by the persons against whom

such report is made, are to be considered as in the nature of penal enactments, still the authority given to the Speaker is of a nature widely different: it is created, not for the purpose of imposing costs, but of ascertaining their amount by the taxation of certain officers therein mentioned; and the clauses relating to it have no other object or effect than to moderate or diminish the amount of the costs already incurred, or, at all events, to ascertain their just measure. They are, in fact, clauses beneficial to, and not in prejudice of, the party against whom the penalty of costs has been awarded under the Statute; and ought, therefore, as it appears to us, to receive a favourable construction in themselves; and that every fair intendment is to be made from the facts disclosed by the affidavits, in support of the jurisdiction under which the Speaker acts.

Now the first objection is, that the name of Mr. *Fector*, the petitioner, no where appears upon the face of any document brought before the Court, until it occurs for the first time in the Speaker's certificate; but that in the original application to the Speaker, a copy "of Mr. *Hart's* account against the petitioners" is transmitted for taxation; and that the reference by the Speaker to the taxing officers, the appointment given by them of the day of taxation, and also their report to the Speaker of the amount of the costs, never disclose the name of the petitioner, but use and adopt the same description as that contained in the first application. It is, therefore, contended by the defendant, that the account of Mr. *Hart* is, or may be, the account of a perfect stranger to the transaction; that the costs and expences may include or belong to something else; and that no authority is shewn in the Speaker to insert the name of Mr. *Fector* in his certificate. But when it is considered that the taxation of the costs which took place, arose out of the decision of the committee appointed to try the merits of the *Maidstone* election, by which it appears, as set out in one of the affidavits, that Mr. *Fector* was the sitting member and the party petitioned against; and that the appointment of the day of taxation is headed "*Maidstone* borough," and the costs and expences of Mr. *Hart*, in the matter of the above election, are therein expressly referred to; that the report of the examiners is headed "*Maidstone* election;" and that the Speaker's certificate is founded expressly on the reference which he had previously made to these same officers, and which he describes in his certificate as a reference of "the costs and expences incurred by *John Minet Fector*, Esq., sitting member for the borough of *Maidstone*," it seems a necessary intendment, that, taking the documents together, the costs and expences of Mr. *Hart*, in the matter of the election, and the costs and expences claimed by the sitting member, must be the same identical costs and expences.

Again, the affidavit of the defendant's agent states that he attended the taxation; that he objected to the authority of the taxing officers, and protested against their proceeding; but that, nevertheless, they proceeded: and though the affidavit is silent as to what objection was made, yet, taking it to have been that which is above adverted to, it could only have been overruled by proof before the officers that the costs of Mr. *Hart*, and the costs of Mr. *Fector*, were identically the same. Indeed, there is not the slightest suggestion in the affidavit that Mr. *Hart's* bill of costs related to any other subject matter than the costs incurred before the *Maidstone* election committee; and such suggestion could never have been omitted, if the fact had warranted the

insertion of it. We, therefore, think the first objection ought not to be allowed to prevail.

The second objection is, that the costs of *Benstead*, an elector, who was allowed by the House to be admitted a party to defend the return of Mr. *Fector*, are included in the amount of the taxation; and that the Speaker had no jurisdiction to make a certificate including both. What was the amount of those costs, so alleged to be due from *Benstead*, the affidavit does not disclose, nor the ground upon which the taxing officers included such costs in the bill; nor, indeed, does it appear, with any degree of certainty, that the agent made any precise objection on this account. But whether he did or not, we think this objection is answered by reference to the 60th sec. of the Stat., by which the certificate of the Speaker is declared to be conclusive evidence of the amount of the costs; the disputed items being in effect items in the account, which the taxing officers, after hearing both sides, thought themselves warranted in allowing, and the Speaker in certifying. And we think the present case differs widely from that of *Strachey* v. *Turley*, where the objection, that the costs of two separate parties were made the subject of a joint taxation, appeared upon the documents themselves; and the Court could not do otherwise than take notice, that, under a power given to tax the costs of "such petition," the officers had taxed the costs jointly of two several petitions, signed by different persons; whereas, in the present case, the objection is raised only by affidavit.

We, therefore, think the objections ought not to be allowed, and that the rule for entering up judgment should be made

Absolute.

THORNHILL *v.* OASTLER.

Jan. 31.

After notice of trial, the Court will not change the venue, at the instance of the defendant, on a general affidavit, stating that sixty witnesses will be required for the defence, and that the costs will amount to 2,000*l.* by trying the cause where the venue is laid.

DEBT and *detinue*; the former for the balance of an account, the latter for a promissory note. Venue, *London*. After issue joined, and notice of trial given,

Atcherley, Serjt., on a former day in this Term, obtained a rule *nisi* to change the venue to *York*, on an affidavit that the trial would probably last four days, that there were sixty witnesses necessary for the defence, who all resided in *Yorkshire*, that the expence of bringing them to *London* would exceed 2,000*l.*, and that the defendant was a very poor man: there was also an affidavit of merits.

Wilde, Serjt., now shewed cause, upon affidavits stating, that the action was brought by the plaintiff against his steward to recover the amount of rents received by him since *July*, 1837, when the accounts were balanced between them; and on a promissory note made by the defendant, in 1836, but which he retained in his possession; he contended there was no ground for the application.

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Atcherley, Serjt., supported the rule.

TINDAL, C. J.—An application of this nature ought not to be acceded to, unless something precise and definite is laid before the Court, to enable them to see that justice imperatively calls for their interposition. It is broadly stated, on the defendant's affidavits, that he has sixty witnesses, and that their expences will amount to 2,000*l.*; one cannot easily see how such a host of witnesses, and so much expence, can be required in such an action as this is described to be; but, at any rate, the affidavit is too general to induce me to interfere with the right which the law has given the plaintiff of laying the venue where he may think it most convenient.

The other judges concurring,

Rule discharged.

Jan. 31.

RENNIE *v.* MILLS.

An action (in which the declaration contained one count on a special contract to accept goods, and a common count for goods sold) was referred to a lay arbitrator, the costs being to abide the event of the award; the arbitrator ordered defendant to pay a certain sum to plaintiff, and found that certain of the goods (mentioned in the special count) were the plaintiff's property; the Master taxed the entire costs for the plaintiff:—*Held*, he was right in so doing, as at most it was merely *ambiguous* on the award, whether the arbitrator had taken the special count into consideration.

ASSUMPSIT. First count on a special contract made between plaintiff and *P. S.*, as agent for defendant, for the sale of 12,000 fir-sleepers, at 2*s.* 4*d.* a sleeper, to be paid for in cash, on delivery. ***Breaches: first***, that plaintiff delivered 31 larch fir, and 195 Scotch fir sleepers, which defendant accepted, but did not pay for; ***second***, that plaintiff shipped 169 larch fir, and 208 Scotch fir sleepers on board a certain vessel, and carried them to *London*, and offered to deliver them to defendant, who would not accept them; ***third***, as to the residue, that plaintiff offered to deliver them to defendant, who would not accept them.

Pleas: first, to all but 39*l.* 7*s.* 11*d.*, ***non-assumpsit; second***, payment into Court of that sum; ***third***, (to first count) that *P. S.* was not defendant's agent; ***fourth***, that plaintiff did not deliver, nor did defendant accept the 31 larch fir and 195 Scotch fir sleepers: ***fifth***, that plaintiff did not offer to deliver the residue.

The cause was referred to a lay-man; the costs of the cause being to abide the event of the award. The arbitrator found that the defendant, at the commencement of the suit, was liable to pay the plaintiff 75*l.*; and ordered that he should pay the difference between that amount and the sum paid into Court: he also found that the sleepers, shipped by the plaintiff, were his property. The Master taxed the entire costs of the cause in favour of the plaintiff; whereupon

Talfourd, Serjt., obtained a rule *nisi* to review the taxation, on the ground that it did not appear by the award that the plaintiff had recovered any thing in respect of the first count; and that, therefore, the costs of that count ought not to have been allowed.

Wilde, Serjt., and *Channell*, shewed cause, and produced an affidavit, shewing that evidence had been given with respect to that count; and they contended, that even on the face of the award, it appeared that the arbitrator had taken the first count into his consideration.

Talfourd and *Hayward*, in support of the rule, objected to the admissibility of the affidavit, on the authority of *Gensham* v. *Germain* (*a*), and contended that, on the face of the award, the arbitrator's finding was on the money count only; that, at any rate, it was consistent with his finding that he had not taken the special count into his consideration; and if he did not, the plaintiff was not entitled to the costs of all the issues, as the event of the award was not wholly in his favour; *Norris* v. *Daniell* (*b*), *Hunt* v. *Hunt* (*c*).

TINDAL, C. J.—This being an application, not to set aside the award, but to review the Master's taxation, the *onus* is on the party making the application to show that the Master is wrong, and that the arbitrator did not take the special count into his consideration. Now, without looking at the affidavit, but looking only at the award, it does not clearly appear that the arbitrator did not do so, or that the award is confined to the second count only. The first breach of the special count, and the second count, involve nearly the same question; namely, whether certain goods had been sold and delivered; and I do not see how we can say that the sum awarded to be paid was in respect of the second count only. Indeed, one part of the award would seem to show that the arbitrator must have considered the claim in the first count; for he finds that the sleepers shipped by the plaintiff were his own property. At the most, it is merely ambiguous on the face of the award; and as the award has been treated as valid, no motion having made to set it aside, I do not see any reason for saying the Master is in error.

The other judges concurring,

Rule discharged.

(*a*) 11 Moo. 1.
(*b*) 10 Bing. 507; 4 Mo. & Sc. 383; 2 D. P. C. 798.
(*c*) 1 Will. Woll. & Dav. 62.

NORCUTT, Assignee of TORR, an Insolvent, *v.* MOTTRAM.

Jan. 31.

TROVER by the assignee of an insolvent, laying the possession in the plaintiff, as assignee, and the conversion in his time. *Pleas:* Not Guilty, and that the plaintiff was not possessed, &c. The cause stood first in the paper for the 5th *December* last. On the 4th, the plaintiff obtained a summons to amend his declaration, by laying the possession in the insolvent, and the conversion before the insolvency. The parties were heard, upon the summons, before the Lord C. J., on the morning of the 5th, when it appeared that the question turned upon the validity of a warrant of attorney, given by the insolvent to the defendant, and under which the latter had taken certain goods of the insolvent's in execution, in *November*, 1837, and that the insolvent was not arrested till the following *May*. The Lord Chief Justice proposed either to make the amendment *instanter*, or that the cause should be

In *trover* by the assignee of an insolvent, laying the property in the plaintiff, he obtained an order on the morning of the day fixed for trial, to amend his declaration by laying the property in the insolvent; whereupon the defendant elected that the cause should be made a *remanet*:

—*Held*, he was entitled to the costs of the amendment, and to plead *de novo*, neither party paying the costs of the day.

Common Pleas.

NORCUTT v. MOTTRAM.

made a *remanet*, no costs to be paid on either side; the defendant's counsel elected the latter alternative.

Erle, Q. C., for the defendant, this Term obtained a rule *nisi* to amend the order of the Lord Chief Justice, by given the defendant the costs of the day, and of the amendment, and allowing him to plead *de novo*.

Wilde, Serjt., and *Miller*, shewed cause.—The amendment could not, in the slightest degree, vary the evidence on either side. It was only proposed for the purpose of adapting the declaration to the real facts of the case There may, perhaps, be no objection to the defendant's having leave to plead *de novo*; but he ought to do so within two days, and no new rule to plead is necessary, pursuant to the rule of this Court, *E.* 1 *W.* 4, s. 2, and *R. G. H.* 2 *W.* 4, s. 42. There is nothing in the present order inconsistent with these rules; and there is no pretence for the defendant's claiming the costs of the day, as he does not show that his defence would have been, in the slightest degree, varied by the amendment, if it had been made on the instant.

Erle, in support of the rule.—The amendment proposes to substitute an entirely new cause of action; and there is no precedent for allowing such an amendment, at the moment a cause is about to be called on. The amended declaration would necessarily call for new pleas which would present totally different issues. The postponement of the cause was clearly brought about by the act of the plaintiff, and he, therefore, ought to pay the costs of the day.

TINDAL, C. J.—At the time of the discussion before me, I understood distinctly that the only question between the parties was, whether or not the warrant of attorney, under which the defendant had taken the goods, was fraudulent. That question, therefore, would evidently remain the same, whether the declaration remained in the original form, or were amended as proposed. That amendment might have been made on the moment; but the defendant elected to have the cause made a *remanet*: he is certainly entitled to plead *de novo*; and the plaintiff should, I think, pay the costs of the amendment; and thus far the rule may be made absolute; but as to the costs of the day, they may be costs in the cause, if the defendant pleases; if not, they must remain as in the former action.

Erle elected the latter.

Rule absolute accordingly.

LANCASTER RAILWAY COMPANY *v.* BRENNAN.

Common Pleas.

Jan. 31.

Defendant having given a wrong address, a third party informed plaintiff he might be found in *Broad-street, London*; and he was described as of that place in the writ of summons:—*Held*, sufficient, though there was no street of exactly that name; and the defendant swore he had never resided in a street of a similar name.

THE writ of summons having been addressed to the defendant, as of *Broad-street*, in the city of *London*,

Peacock had obtained a rule *nisi* to set it aside, upon an affidavit that there was no such street in the city of *London*, that there were streets called *Old Broad-street*, *New Broad-street*, and *Broad-street-buildings*, but that the defendant had never resided in any one of them, or ever told any body that he had done so.

Cole shewed cause, on an affidavit stating, that various enquiries had been made as to the defendant's residence, and that a broker had informed the plaintiff's attorney that the defendant was to be met with in *Broad-street*, or on 'Change. The defendant had himself referred the attorney to a coffee-shop (in *Holborn*) but nothing was known of him there.

Peacock was heard in support of the rule.

THE COURT, after referring to *Norman* v. *Winter* (*a*). said they thought the description was sufficient.

Rule discharged.

(*a*) *Ante*, p. 511; 5 N. C. 279.

DOE, d. CHAPMAN *v.* BLUCK.

The Court stayed proceedings in a second action of ejectment until payment of the costs of a former one, the title being the same, although growing crops had been seized under the writ of possession in the first action, which were of sufficient value to cover such costs.

GUNNING had obtained a rule *nisi* to stay proceedings in this ejectment, until payment of the costs of a former ejectment, brought by the now defendant against the lessor of the plaintiff, in which the now defendant had obtained a verdict.

Palmer shewed cause, on an affidavit, stating that the present defendant was the landlord, and had executed a writ of possession, and seized a quantity of growing crops, the property of the present lessor of the plaintiff, of sufficient value to cover the costs of the first action, that there was no rent in arrear, and that the premises had been let to another tenant.

Gunning, in reply.—The taking of the crops is no answer to the present application. Either the landlord was entitled to the crops, or he was not: if he has taken them wrongfully, an action may be maintained for them.

TINDAL, C. J.—The case is not taken out of the ordinary rule. Should the present plaintiff recover in this action, he may afterwards sue for the crops.

Rule absolute.

Common Pleas.

DOUGLAS *v.* CONGREVE.

A testator devised his freehold estates to *M. S.* for life, for her sole use; remainder to her husband for life; remainder to the use of the heirs of the body of *M. S.* in tail; remainder to *A. M.* for life, with remainders over; and declared that all the aforesaid settlements were intended by him to be in strict settlement, with remainder to his own right heirs for ever:—*Held*, that *M. S.* took an immediate estate for life in the said estates, and an estate in remainder in tail general in the same lands, expectant on the determination of the estate for life, limited to her husband.

IN this case, the Court, in last *Michaelmas Term*, having certified their opinions (*a*), afterwards returned the following amended certificate:—

"We have heard this case argued, and we are of opinion that the plaintiff took under the will of *George Douglas*, the testator, an immediate estate for life in the real estates of the said testator, at *Chilston*, and elsewhere, in the county of *Kent*, and an estate in remainder in tail general in the same lands, expectant on the determination of the estate for life, limited to *James Douglas Stoddart*.

"*November* 25th, 1837.

"*N. C. Tindal.*
"*J. A. Park.*
"*J. Vaughan.*
"*T. Coltman.*"

(*a*) See 3 Hodg. 235; 4 N. C. 1; 5 Sc. 224.

END OF HILARY TERM.

HILARY VACATION, 1839.

Sittings in *Banc, coram* TINDAL, C. J., VAUGHAN, J., BOSANQUET, J., and ERSKINE, J. (*a*).

PENNEY *v.* SLADE and another.

Common Pleas.

Feb. 5.

Where overseers are appointed by magistrates in Petty Sessions (being a judicial act), a party who has been distrained upon for poors' rate cannot, in the absence of fraud in such appointment, question its validity (upon the ground of want of deliberation among the magistrates in Sessions) in an action of trespass against the magistrates who signed the distress warrant.

The proper mode of questioning the validity of the appointment is by appeal, or by application to *Q. B.*

The question of fraud in such a case is for the jury, and the Court will not enquire into the fact whether or not the appointment was the result of deliberation among the magistrates.

TRESPASS for taking the plaintiff's goods.

At the trial, before Lord *Denman*, C. J., and a special jury, at the last Spring Assizes for *Dorsetshire*, it appeared that the action was brought against the present and late mayor of *Poole*, for the purpose of trying the validity of the appointment of certain parties as overseers, who had made a poor rate; a warrant to enforce the payment thereof having been signed by the two defendants, as magistrates of the borough, and the goods in question having been seized under it.

The evidence as to the manner in which the appointment was made, was conflicting, but the following facts were not disputed.

A petty Sessions, for the appointment of overseers, was duly convened; and at the hour appointed there were seven magistrates assembled (including the two defendants.) A list of persons eligible as overseers was produced by the magistrates' clerk, and read over by one of the defendants (the then mayor.) An objection was made to this list, by one of the magistrates, as being made for party purposes; and he proposed, that one overseer from each party should be chosen, and brought forward a list of names for this purpose. While this list was being read, the mayor stated he should appoint the two first names of the list previously produced, and he then took out two blank forms of appointment, which he signed, and handed to the other defendant, who, after having signed them, passed them to a third magistrate, who was sitting near to them, and after his signature was obtained, the mayor delivered them to the high constable in attendance, who immediately left the room to serve them on the parties.

One of the other magistrates (who were not cognizant of these proceedings) subsequently proposed other parties as overseers, but the mayor refused to put the question; (during this discussion two other magistrates joined the meeting;) the question was, however, put by the magistrates' clerk, when six out of the seven magistrates then present voted for the last mentioned parties, the two defendants and the other magistrates, who had previously concurred with them, declining to vote.

The main point upon which there was a contrariety of evidence, was as to the manner in which the appointment in question had been made; the witnesses for the plaintiff stating that it had been done with great secrecy and

(*a*) Pursuant to the Statute 1 & 2 Vict. c. 32.

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dispatch; and the witnesses for the defence (one of whom was the magistrate who concurred in the appointment) stating the contrary.

The Lord Chief Justice told the jury, if they thought the defendants had acted fraudulently in appointing the overseers, such appointment was void, and they should find a verdict for the plaintiff; but if they thought the defendants had acted *bonâ fide*, the verdict ought to be for them. The jury having found for the defendants,

Crowder, Q. C., in last *Trinity Term*, obtained a rule *nisi* for a new trial, upon the ground of misdirection, inasmuch as the appointment was void by reason of the want of deliberation among the magistrates, *Rex* v. *Forrest* (*b*), *Rex* v. *Hamstall Ridware* (*c*); and that the verdict was against evidence, inasmuch as fraud was clearly made out against the defendants.

Wilde and *Bompas*, Serjts., and *Barstow*, shewed cause.—*First*, the direction was correct. The appointment of overseers by magistrates, under the 43 *El.* c. 2, s. 1, is a judicial act, *Rex* v. *Flag* (*d*), *Rex* v. *Forrest*; so also was the granting the warrant, *Harper* v. *Carr* (*e*), and, therefore, both acts being done by the defendants within their jurisdiction, in the absence of fraud, they are not responsible; 12 *Rep.* 23, 25. *Dicas* v. *Lord Brougham* (*f*), *Brittain* v. *Kinnaird* (*g*), *Basten* v. *Carew* (*h*), *Ashcroft* v. *Bourne* (*i*), *Fawcett* v. *Foulis* (*j*), *Garnett* v. *Ferrand* (*k*), *Tinsley* v. *Nassau* (*l*), *Lowther* v. *Lord Radnor* (*m*), *Lord Radnor* v. *Reeve* (*n*). *Strickland* v. *Ward* (*o*), *Wilson* v. *Weller* (*p*). At the utmost, the appointment, like an order for removal, was voidable, and not void; and the remedy was by appeal, *Rex* v. *Stotfold* (*q*), or by application to the Court of *Queen's Bench*, in the Term ensuing the appointment, *Rex* v. *Great Marlow* (*r*).

Secondly, the question of fraud was one entirely for the jury; and unless the Court were fully satisfied of the existence of fraud, they would not send the case, being in the nature of a criminal prosecution, down to a new trial, *Rex* v. *Hawkins* (*s*).

Crowder, *Bingham*, *Butt*, and *Newman*, in support of the rule.—The cases cited on the other side, to show the exemption of a magistrate from liability to action, are where the act done by him is entered of *record*; and the principle does not apply here, for neither the appointment of the overseers, nor the distress warrant, is a record. All judicial acts require a conference among those in whom a discretion is vested, *Rex* v. *Forrest*, *Battye* v. *Gresley* (*t*), *Rex* v. *Coln St. Alnwin's* (*u*), *Billings* v. *Prinn* (*v*). In the present case, the defendants might alone have made the appointment, but

(*b*) 3 T. R. 38.
(*c*) *Id.* 380.
(*d*) 1 Sess. Ca. 324; 1 Bott. 16.
(*e*) 7 T. R. 270.
(*f*) 1 Moo. & R. 309; 6 C. & P. 249.
(*g*) 1 B. & B. 432; 4 Moo. 50; Gow. 164.
(*h*) 3 B. & C. 649; 5 D. & R. 558.
(*i*) 3 B. & Ad. 684.
(*j*) 7 B. & C. 394; 1 M. & R. 102.
(*k*) 6 B. & C. 611; 9 D. & R. 657.
(*l*) 1 Moo. & Mal. 52; 2 C. & P. 582.
(*m*) 8 Ea. 113.
(*n*) 2 B. & P. 391.
(*o*) 7 T. R. 634, n.
(*p*) 1 B. & B. 57; 3 Moo. 294.
(*q*) 4 T. R. 596.
(*r*) 2 East, 243.
(*s*) 10 Ea. 211.
(*t*) 8 Ea. 319.
(*u*) Burr. Sett. Ca. 136.
(*v*) 2 W. Bl. 1017.

being assembled with other magistrates, they were bound to confer with them, and, in the absence of such conference, the appointment of overseers was void, and the warrant to enforce a poor rate, made by them, was illegal; the magistrates, therefore, in granting such warrant, exceeded their jurisdiction, and are liable to an action, *Nichols* v. *Walker* (*w*), *Milward* v. *Caffin* (*x*), *Lord Amherst* v. *Lord Sommers* (*y*), *Stanley* v. *Fielden* (*z*), *Weaver* v. *Price* (*a*), *Davis* v. *Capper* (*b*). A party is not bound to appeal if he has another remedy, *The Governors, &c. of the Poor of Bristol* v. *Wait* (*c*). The defendants cannot set up the warrant to shield themselves from their liability in making the illegal appointment, for the action is brought to impeach the warrant, and the maxim is, *exceptio non permittitur ejusdem rei cujus petitur dissolutio;* as in *Strother* v. *Hutchinson* (*d*), where the plaintiff had been nonsuited against his will, the defendant was not allowed to contend that the plaintiff was concluded by the record from shewing that, in fact, he did appear at the trial. The time of the meeting at the Petty Sessions is indivisible in law; and the appointment might have been revoked or altered during such meeting, in the same manner as a record of the superior Courts, though of a much higher nature, may be altered during the Term, *Co. Litt.* 260. a.; *Rex* v. *Carlile* (*e*), *Richardson* v. *Mellish* (*f*).

As to the second point, they contended that the fraud was so gross and palpable, as to render the verdict almost perverse.

Cur. adv. vult.

TINDAL, C. J., now gave judgment.—This was an action of trespass, for seizing the goods of the plaintiff under colour of a warrant, signed by the defendants (who were magistrates of the borough of *Poole*, one of them being the mayor), for the purpose of enforcing payment of a poor rate, on the ground that the overseers, by whom it was made, had not been duly appointed, but that their appointment was void.

Upon the trial of the cause, at the last Spring Assizes for the county of *Dorset*, before Lord *Denman*, it was proved that a notice had been duly given for holding a meeting of the magistrates, for the purpose of appointing overseers. The meeting was attended by the mayor, and six other magistrates, in the first instance; and two others came in afterwards, though at what particular period they arrived did not very clearly appear.

The appointment in question was signed at this meeting by the mayor, and two others of the magistrates, and was immediately issued to the parties thereby appointed; and it was contended at the trial, that this appointment was fraudulently and surreptitiously made by the magistrates who signed it, without the concurrence of the others who were present at the time, and met for the purpose of making the appointment, and without opportunity afforded them for deliberation.

The question of fraud was left by Lord *Denman* to the jury, who found a verdict for the defendants, thereby negativing the fraud imputed to them.

(*w*) Cro. Car. 354; 1 Jerr. 355.
(*x*) 2 W. Bl. 1330.
(*y*) 2 T. R. 372.
(*z*) 5 B. & A. 425.
(*a*) 3 B. & Ad. 409.
(*b*) 10 B. & C. 28; 5 M. & R. 53; 4 C. & P. 134.
(*c*) 1 A. & E. 264; 3 N. & M. 359; 6 C. & P. 591.
(*d*) 3 Hodg. 294; 4 N. C. 83; 5 Sc. 346; 6 D. P. C. 238.
(*e*) 2 B. & Ad. 971.
(*f*) 3 Bing. 334; 11 Moo. 104; S. C. (in error) 1 B. & C. 819; 1 Cl. & Fin. 224.

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A rule *nisi* was obtained in the following Term for a new trial, on the ground of misdirection, or, in the alternative, as upon a verdict against evidence.

The ground on which the charge was impugned for misdirection, was this: The plaintiff contended, that the magistrates having assembled for the purpose of appointing overseers, which is a judicial act (*Rex* v. *Forrest*), the jurisdiction of the whole assembled body had attached, and that no appointment could be valid unless a majority of the assembly concurred in its being made; and that the jury ought to have been told that, even if there were no fraud, yet if, through ignorance of their duty, an appointment was made by some of the assembled magistrates, without the concurrence of the majority, or opportunity afforded to the majority for deliberation, the appointment was void for want of jurisdiction; and that the point for them to consider was, whether the appointment had been made with the concurrence of the majority, and after opportunity for deliberation.

If this objection is to prevail, it is difficult to say how far it will extend. Is it necessary that the magistrates should express their opinion in words, or will a silent assent be sufficient? Would it be allowable, in such a case as the present, for the plaintiff to go into evidence that such or such a magistrate voted against the appointment, but was misheard, or that the number of persons who had given their opinions was miscounted, or that some of the magistrates had been engaged in other matters, and had not been aware when the question was put?

In the case of *The King* v. *The Justices of Leicestershire* (*g*), which arose out of an appeal against an order of removal, the Court of Quarter Sessions had been equally divided; but through a mistake in reckoning the numbers, judgment was entered for quashing the order. An application was made to the Court of *King's Bench* for a *mandamus* to the justices to enter continuances on the appeal to the next Quarter Sessions, and then to hear and determine the same. But the Court, on cause shewn, refused the *mandamus*, considering that a judgment having been entered in the Court below, the Court of *King's Bench* could not (as was said by Lord *Ellenborough*) hold a sort of balloting-box to ascertain the voices that were given, or whether they were correctly cast up.

Now this was a judgment confessedly wrong, entered up without any legal authority in any one to enter it; yet, as long as it remained unquashed on the files of a Court, which had a jurisdiction over the subject matter, the Court could not treat it as a nullity.

This case seems to furnish an analogy sufficient for the determination of the present case. Here is a judicial act performed, without fraud, at a meeting which was competent, in point of jurisdiction, to perform it, and that act verified by a sufficient number of signatures to satisfy the requisitions of the Statute which directs the appointment to be made. We think, therefore, that it cannot be questioned in this collateral way, on the ground of an irregularity or miscarriage, in ascertaining the sentiments of the meeting.

We have the less hesitation in coming to this conclusion, because the law has provided appropriate methods of settling such a question. The appointment may be directly questioned by an appeal to the Sessions, or, if there is

(*g*) 1 M. & S. 442.

any impropriety in the mode of the appointment, it may be set aside by a direct application for that purpose to the Court of *Queen's Bench*, *Rex* v. *The Overseers of Bridgewater* (*h*). It is obviously a much more convenient course, that the validity of the appointment should be brought into controversy in a direct way, immediately upon the appointment, than that a party should lie by until a rate has been made and levied, and should then be allowed to revert back to some miscarriage in the appointment. No objection arising in such a way ought to prevail, unless it rests on the most solid ground, which, in our judgment, the present objection does not.

With respect to the alternative branch of the rule for a new trial, on the ground that the verdict was against evidence, we consider the case as being one peculiarly for the determination of the jury; and we should be very slow to grant a new trial in a case of imputed fraud, where the jury have negatived the fraud, especially in a case where the plaintiff has declined the direct mode of questioning the appointment provided by the law for that purpose, and has himself selected a tribunal very inconvenient, if not oppressive, to the defendant.

Upon these grounds, we think the rule, which has been obtained for a new trial, should be discharged.

Rule discharged.

(*h*) Cowp. 139.

BERRINGTON *v.* COLLIS.

Feb. 8.

THIS was a *Special Case*, submitted, by the consent of the parties, for the opinion of the Court, upon affidavits, it being agreed that the Court might draw such inferences therefrom as a jury might have done if the facts alleged in them had been given in evidence at *Nisi Prius*.

It appeared from undisputed facts on the affidavits, that the defendant borrowed of the plaintiff, on the 1st of *September*, 1837, the sum of 150*l.*, to be repaid by instalments at four, eight and twelve months; and that it was agreed at the time of the contract for the loan, that the plaintiff should receive 15*l.* for such loan; that the agreement was carried into effect by the plaintiff advancing to the defendant the sum of 135*l.* only; and that he received from him, by way of security, *a promissory note*, dated 1st *September*, payable at three instalments (as above mentioned), and also the deposit of a lease of the defendant's house, and a warrant of attorney to enter up judgment upon non-payment of the promissory note.

The disputed facts were, that, on the part of the plaintiff, it was sworn that the money had been originally proposed to be borrowed, and was lent, on the security of the promissory note, and that the deposit of the lease and warrant of attorney were subsequently added as collateral securities; and, on the part of the defendant, that the money was borrowed, and lent on the security of his house, and that the promissory note and warrant of attorney were afterwards added as collateral securities.

The Statutes 3 & 4 *W.* 4, c. 98 (s. 7), and 1 Vict. c. 80, (s. 1,) do not extend to cases where a bill or note is given in addition to a security of another nature, upon which the debt was really contracted.

Therefore, a loan made at more than 5 *per cent.*, upon the security of a deposit of a lease, a promissory note, and a warrant of attorney, *held* not to be protected by those Statutes.

Default having been made in the payment of the first instalment of the note, the plaintiff signed judgment and issued execution, whereupon the defendant had obtained a rule *nisi* to set aside the judgment, when the facts were turned into a special case, as above stated.

Erle, Q. C., for the plaintiff, contended that the transaction was legal (notwithstanding the usury laws), under 3 & 4 *W.* 4, c. 98, s. 7 (*a*), and 7 *W.* 4, and 1 *Vict.* c. 80, s. 1 (*b*). He relied on *Connop* v. *Meeks* (*c*), and *Ex parte Knight* (*d*), where a creditor having advanced money to the bankrupt, by discounting bills, payable within three months from the date, and on the security of the deposit of goods, taking more than 5 *per cent.* for the discount, the Court of Bankruptcy held that this was within the provisions of the former Statute.

Petersdorff, for the defendant, argued that the Statutes cited on the other side applied to cases where a loan was made on a note or bill only, and not where it was made on any additional security; and if such additional security were illegal, the whole transaction was invalid, *Roberts* v. *Tremayne* (*e*). The recent Statutes are not to be extended; as in *Vallance* v. *Siddel* (*f*), it was held, that the 58 *G.* 3, c. 93, only protects *bonâ fide* holders of bills or notes tainted with usury, who have *discounted* such bills or notes, or *paid* valuable consideration for them *at the time of indorsement*, and that it does not include a *bonâ fide* holder who has taken such a bill in *payment* of an antecedent debt.

Erle, in reply, argued that if the Court put a strict construction upon the recent Statutes, they would defeat the intention of the legislature; for it could not have been meant that a party might lend money to another, who had no security to offer but his bill or note, at any rate of interest, while, in a loan to one who *had* better security, he was limited to the old rate of interest; otherwise, the effect would be, that the worse security a borrower had to offer, the larger interest the lender would be entitled to take.

Cur. adv. vult.

(*a*) Enacting, "that no bill of exchange, or promissory note, made payable at or within *three months* after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon, or secured thereby, or any agreement to pay, or receive, or allow interest in discounting, negociating or transferring the same, be void, *nor shall the liability of any party to any bill or promissory note be affected* by reason of any Statute or law in force for the prevention of usury; nor shall any person, or persons, drawing, accepting, indorsing or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest for the loan of money on any such bill or note, be subject to any penalties under any Statute or law relating to usury, or any other penalty or forfeiture; any thing, in any law or Statute relating to usury to the contrary, notwithstanding."

(*b*) By which the exemptions from the usury laws, contained in the 3 & 4 *W.* 4, c. 98, s. 7, were extended to bills and notes at *twelve months*. This Statute would have expired on the 31st *December*, 1839, but by the 2 & 3 *Vic.* c. 37, its provisions, as to bills and notes at twelve months, are re-enacted, and are extended to cases of contracts for loan or forbearance of money above 10*l.*, which are not to be affected by the usury laws, except in cases where such loan or forbearance is made on the security of lands, &c. This Act will expire on the 31st *December*, 1841.

(*c*) 2 A. & E. 326; 4 N. & M. 303.

(*d*) 1 Deac. 459; 2 Mont. & Ayr. 568.

(*e*) Cro. Jac. 507.

(*f*) 6 A. & E. 932; 2 N. & P. 78

TINDAL, C. J., now gave judgment.—This case comes before us on a rule obtained by the defendant to set aside a judgment signed upon a warrant of attorney given by him, and all subsequent proceedings thereon. The warrant of attorney was subject to a defeazance, by which it appeared to have been given to secure the due and punctual payment of the sum of 150*l.*, the amount of a certain promissory note given by the defendant to the plaintiff, by three instalments of 50*l.* each. This note was dated on the 1st of *September*, 1837, and the three instalments were payable at four, eight, and twelve months from the date; and it appeared from the affidavits on each side, that at the time of the contract for the loan, it was agreed that the plaintiff should receive the sum of 15*l.* for the said loan, which agreement was afterwards carried into effect by the plaintiff paying to the defendant 135*l.* only at the time of the securities being executed by the defendant. But the affidavits raise also a disputed fact, upon which the whole question between the parties will turn; the affidavits on the part of the plaintiff, alleging that the contract between the parties was for a loan of 150*l.* on the promissory note of the defendant, and that the security of a warrant of attorney, and a deposit of a lease of the defendant's dwelling-house, was but an afterthought, and no part of the original contract; the defendant's affidavits, on the other hand, alleging that the real contract was for a loan upon the security of the leasehold premises, and that the note was afterwards added for the purpose, and as affording the means, of avoiding the Statute of Usury.

Now, in this case, we are called upon by the parties, by their mutual consent, to draw such inferences of fact from the affidavits as a jury might do, if the matters of such affidavits had been in evidence at *Nisi Prius*; and after giving our full consideration to the subject, we are of opinion that the proper conclusion to be drawn from the evidence by a jury at *Nisi Prius* would be, that the loan was agreed upon and entered into between the parties as a loan upon the security of the deposit of the lease of the defendant's dwelling-house, and that the security of the promissory note and warrant of attorney was added to the security of the deposit for the purpose of legalizing the demand of interest beyond 5 *per cent.*

We think such a transaction is not brought within the words of the Statutes 3 & 4 *W.* 4, c. 98, s. 7, or 7 *W.* 4 and 1 *Vict.* c. 80, those Acts contemplating the case of interest taken upon, or secured by, a bill of exchange or promissory note as the real and *bonâ fide* ground of the debt; and not extending, or meant to extend, to the case of a bill of exchange or promissory note given in addition to a security of another nature, not protected by the Statute, upon which the debt was really contracted; for, if the latter case should be held to be comprised within the Act, it would, in effect, nearly operate as a general repeal of the Statute of Usury, by enabling persons who had lent money upon mortgage, at usurious interest, to sue for and recover principal and interest upon a bill or note, though the mortgage security might be void; and even to enforce a valid security upon the land for the principal, if the usurious interest should not be reserved by the mortgage; and we think the case of *Ex parte Knight In re Pownall*, is clearly distinguishable from the present. The contract in that case was an express and specific contract of discount upon various bills of exchange, and nothing else, not at all varied or modified in its nature by reason of the lender having at the time collateral securities in his hands for the repayment of monies that might become due;

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but in this case the contract is of a loan upon the pledge of the title deeds. And in *Connop* v. *Meeks*, the discount of the bills of exchange being legalized by the Statute 3 & 4 *W.* 4, c. 98, there could be no reason why a warrant of attorney, given subsequently as a security for such legal debt, should not be valid also.

But as the loan in the present case was not, in our opinion, really made upon the security of the promissory note, the discount taken makes the debt invalid, and consequently we think the warrant of attorney given for such illegal debt is invalid also.

Judgment for the defendant (*g*).

(*g*) Where *A.* had lent a bankrupt 1,600*l.* on his promissory note, payable three months after date, renewable for the same period at the option of the bankrupt, but so as not to exceed the period of eighteen months in the whole, the bankrupt undertaking to pay 7½ *per cent.* interest, and 3 *per cent.* interest for insurance, and the note was renewed four times successively, and on each renewal the same rate was deducted for interest and insurance, the Court of Bankruptcy *held* that this transaction was *not* protected by the 3 & 4 *W.* 4, c. 98, s. 7, and was consequently usurious, and that the note was incapable of proof; *Ex parte Terrewest*, 3 Dea. 590. But where *A.* had agreed with *B.* to lend him 200*l.* at the rate of 1*s.* in the pound *per* month, (being at the rate of 60 *per cent per annum*,) to be secured as follows: *viz.*, when any portion of the money should be advanced, the borrower was to give a promissory note, payable one month after date, to be renewed as often as it should fall due, and for each renewal 1*s.* in the pound was to be paid by way of discount, the Court of *Exchequer held* that the promissory notes so given were within the protection of 3 & 4 *W.* 4, c. 98, and 7 *W.* 4, & 1 *V.* c. 80; *Holt* v. *Miers*, 5 M. & W. 168. *Parke*, B., in giving judgment, said he thought the judges of the Court of Bankruptcy, in *Ex parte Terrewest*, had given too narrow a construction to the former Act.

Feb. 9.

UPWARD *v.* KNIGHT.

Where a plea is expressly pleaded to *part* only of the cause of action, it ought to commence with the allegation of *actionem non*, and end with a prayer of judgment.

A plea of set-off, stating that "before the commencement of the action" the plaintiff was indebted to the defendant upon an account stated, contains a sufficient allegation of the time when such account was stated.

ASSUMPSIT for goods sold, money lent, and on an account stated. *Pleas: first*, that 10*s.*, parcel, &c., was claimed on account of the sale of spirituous liquors; *second*, a set-off for money due from the plaintiff to the defendant before and *at the commencement of the action*, in respect of work and labour, money paid, and on an account stated; *third*, that upon an account stated, the defendant allowed the plaintiff 2*l.* 13*s.* 4½*d.*, due from the plaintiff to the defendant; that afterwards, the defendant was indebted to the plaintiff 7*l.*, and payment thereof before the commencement of the action. *Demurrer*, to the second and fourth counts, that although they were respectively pleaded to a *part* only of the cause of action, they did not commence with the form of *actionem non*, or conclude with a prayer of judgment; and to the third, that it did not specify the time when the account was stated.

C. Jones, in support of the demurrer to the second and fourth pleas, referred to *R.* 9, *H.* 4 *W.* 4. Although the formal commencement and conclusion is not necessary in a plea which applies to one count only, if it

applies to the whole cause of action in that count, *Bird* v. *Higginson* (*a*), it is different where the plea applies to only part of the cause of action in any one count, as is the case with the second and fourth pleas here. In support of the demurrer to the third plea, he cited *Higgins* v. *Highfield* (*b*), *Denison* v. *Richardson* (*c*), and *Ferguson* v. *Mitchell* (*d*).

Marshman, contrà; as to the second and fourth pleas.—The distinction is between pleas pleaded in bar of the whole action, and in bar of the *further maintenance* of the action; in the latter case, the formal commencement and conclusion are necessary, but not in the former; *Putney* v. *Swann* (*e*). As to the third plea; the cases cited were demurrers to declarations, and it has never been decided that in a plea of set-off, upon an account stated, it is necessary to allege the time: but supposing it were necessary, the demurrer here is too large, for it ought to have been confined to the claim on the account stated, which is in the nature of a separate count, *Ferguson* v. *Mitchell*, *Spyer* v. *Thelwell* (*f*).

TINDAL, C. J.—By the terms of the new rule which has been referred to, a plea, wanting the formal commencement and conclusion, must be considered as pleaded in bar of the whole action, unless otherwise expressed. Here the second and fourth pleas *are* expressed to be pleaded only to part of the cause of action, and I think such formal parts should have been added; but the defendant may have leave to amend. As to the objection to the third plea, that it is not stated *when* the account was stated between the parties, it is a sufficient answer that the plea states that the plaintiff was indebted to the defendant, in respect of the several matters therein mentioned, *before the commencement of the action.*

(*a*) 1 H. & W. 61; 2 A. & E. 696; 4 N. & M. 505.
(*b*) 13 Ea. 407.
(*c*) 14 Ea. 291.
(*d*) 2 C. M. & R. 687; 4 D. P. C. 513.
(*e*) 2 Gale, 216; 2 M. & W. 72; 6 D. P. C. 296.
(*f*) 1 Gale, 348; 2 C. M. & R. 692; 4 D. P. C. 509.

IN THE EXCHEQUER CHAMBER.

Exch. Chamber.

Feb. 11.

The alleged consideration for the defendant's promise to pay money to the plaintiff was the plaintiff's undertaking to *execute* "a certain deed of separation between himself and his wife," which deed had been already prepared:—*Held*, on error, that as nothing appeared to shew that the deed of separation was illegal, the Court would not presume its illegality, and that the consideration therefore was not illegal. (Judgment of *C. P.* affirmed, *per Littledale*, J., *Alderson*, B., and *Patteson*, J.; *dissentientibus*, Lord *Denman*, C. J., and Lord *Abinger*, C. B.)

JONES *v.* WAITE.

THIS case was argued in the *Common Pleas* in *Easter Term*, 1835, and judgment was given for the plaintiff (*a*). Upon error brought, it was argued in the *Exchequer Chamber* in *Hilary Vacation* (4th *February*, 1836.)

The arguments were the same as in the Court below; but the following additional cases were cited by

T. F. Ellis, for the plaintiff in error.

Best v. *Jolly* (*b*), *Cripps* v. *Golding* (*c*), *Bradburne* v. *Bradburne* (*d*), *Coulston* v. *Carr* (*e*), *Crisp* v. *Garnel* (*f*), *Bret* v. *J. S. and his Wife* (*g*), *Com. Dig.* "Action on the case in Assumpsit" (B.), *Bridge* v. *Cage* (*h*), *Scott* v. *Gillmore* (*i*), *Harris* v. *Watson* (*j*), *Stilk* v. *Myrick* (*k*), 2 *Wms. Saund.* 136, n. (2), *Worrall* v. *Jacob* (*l*), *Wilkes* v. *Wilkes* (*m*), *Holland* v. *Hall* (*n*), *Allen* v. *Hearn* (*o*), *Card* v. *Hope* (*p*), *Key* v. *Bradshaw* (*q*).

And by *R. V. Richards*, *contrà*, *Hobson* v. *Middleton* (*r*), *Elworthy* v. *Bird* (*s*).

[*Ord* v. *Fenwick* (*t*) was also referred to by *Littledale*, J., in the course of the argument.]

The Court took time to consider, and there being a difference of opinion among the judges, they now delivered their opinions *seriatim*.

PATTESON, J.—The objection to the plaintiff's recovering in this action a sum of 110*l.*, which the defendant had promised to pay him at *Michaelmas*, 1834, arises from the consideration for that promise. From the declaration and plea, it appears that the consideration consisted of two parts; first, the plaintiff's executing a deed of separation between himself and his wife, which had been already prepared; and secondly, the plaintiff's taking upon himself certain payments to Messrs. *Horne* and *Gates*, and certain household expences and debts, and agreeing to pay the same in full, but for which payments, expences and debts the plaintiff was already solely liable. The second part of this consideration may be treated as wholly nugatory, as

(*a*) See 1 Hodg. 166; 1 N. C. 656; 1 Scott, 730.
(*b*) 1 Sid. 38.
(*c*) 1 Rol. Abr. 30, "Action sur Case," [*Assumpsit*] (Y) 2; 1 Vin. Abr. 332.
(*d*) Cro. Eliz. 149; 3 Leon. 91.
(*e*) Cro. Eliz. 847, 2d resolution.
(*f*) Cro. Jac. 127.
(*g*) Cro. Eliz. 755.
(*h*) Cro. Jac. 103.
(*i*) 3 Taunt. 226.
(*j*) Peake, 72.
(*k*) 2 Camp. 317; 6 Esp. 129.
(*l*) 3 Mer. 268.
(*m*) 2 Dick. 791.
(*n*) 1 B. & A. 53.
(*o*) 1 T. R. 56.
(*p*) 2 B. & C. 661; 4 D. & R. 164.
(*q*) 2 Vern. 102.
(*r*) 6 B. & C. 295; 9 D. & R. 249.
(*s*) 2 Sim. & Stu. 372.
(*t*) 3 Ea. 104.

being merely an engagement by a man to pay his own debts; and the question turns entirely upon the first part. If that be illegal, the action must fail, because illegality of part of the consideration, doubtless, vitiates the whole contract.

Now it is conceded that a separation of husband and wife may be in itself a legal act, and that any deed or agreement for carrying it into effect may be legal, provided it be for an actual and immediate, and not for a contingent or future, separation. The terms of the deed of separation in the present case are not stated upon the record; but as illegality is not to be presumed, we must take it that the deed is in its provisions legal. It is, however, said, that it is illegal to give the husband money as an inducement to consent to such actual and immediate separation, and that an engagement to pay him part of certain debts for which he is solely liable, is tantamount to giving him money. The illegality of so doing is sought to be established by reference to the cases of *Hartley* v. *Rice* (*u*), *Allen* v. *Hearn*, and *Card* v. *Hope*. Those cases are perhaps distinguishable. In *Hartley* v. *Rice*, the agreement not to marry was held illegal in itself, quite independently of *money* being the inducement. *Allen* v. *Hearn* was a case of wager as to the election of members of parliament, a matter which was held to be incapable of being the subject of any binding contract. *Card* v. *Hope* turned upon the contract being a fraud upon the bye-laws of the *East India Company*. But admitting that the consent of the husband to a separation cannot legally be purchased, it by no means follows that part of the arrangement, in carrying into full effect a separation previously agreed upon, may not legally be, that the husband should be indemnified in the whole, or in part, against certain debts contracted during the time that he and his wife were living together, and for which he is solely liable in point of law, in the same manner as it is unquestionably a legal part of such arrangements, that he should be indemnified against the debts to be contracted afterwards, for which he might also become liable in point of law. On the contrary, I am of opinion that such indemnity is legal, and that the husband might legally make it the condition of his executing the deed of separation which had been prepared.

The question, therefore, as it seems to me, is reduced to this: whether, upon the face of this record, it appears that the defendant promised to pay the plaintiff money in consideration of separating, or agreeing to separate, from his wife; in which case I think that the contract would be illegal: or that the defendant promised to pay the plaintiff money towards certain expences already incurred, whilst the plaintiff and his wife were living together, in consideration that the plaintiff would execute a deed of separation which had been already prepared. I think that the record shews the latter state of facts.

I agree with the learned counsel for the defendant (plaintiff in error,) that the Court cannot conjecture anything respecting the contents of the deed of separation, or import into the case any supposed facts for the purpose of shewing the legality or illegality of the contract. I take the facts only as they appear on the record, and they are these: that by a deed of separation between the plaintiff and his wife, not yet executed by the plaintiff, he was to quit a house at *Holloway* on a certain day, and that some annuity was

(*u*) 10 Ea. 22.

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mentioned in that deed; that afterwards, by the written memorandum of agreement on which the plaintiff in this action declares, the time for quitting the house at *Holloway* was extended; that the plaintiff agreed to pay Messrs. *Horne* and *Gates* the household expences at *Holloway*, and the *Rickmansworth* debts, in full; and that, in consideration of his so agreeing, and of his executing the deed of separation, the defendant promised to pay him 160*l.*, by eight half-yearly payments, towards the debt due to *Horne* and *Gates*, 20*l.* towards the *Rickmansworth* debts, and 220*l.*, by two payments, at *Michaelmas*, 1834, and *Lady Day*, 1835, towards the household expences at *Holloway*.

It is plain, from these facts, that for some reason or other (and we are not to presume an illegal one) a separation between the plaintiff and his wife had been determined upon, the terms of which had been reduced into writing in the form of a deed; that the plaintiff for some reason or other had not yet executed that deed, and that he was induced to execute it by the defendant's promise, which is, in effect, a promise to indemnify the plaintiff against, amongst other things, a part of the bygone household expences of the house at *Holloway*, which the plaintiff was to quit.

I assume the deed of separation to be legal, because no illegality is shewn; and I hold the consideration for the defendant's promise to be legal, because it is not that the husband would separate from his wife, but that he would complete the instruments and arrangements of a separation already determined upon.

For these reasons, I am of opinion that the judgment of the Court below ought to be affirmed.

ALDERSON, B.—I also am of opinion that the judgment of the Court of *Common Pleas* ought to be affirmed, and I shall state my reasons very shortly.

It is conceded that, if any part of the consideration for the promise of the defendant below be illegal, the judgment ought to be reversed; and it cannot be disputed, that an engagement to pay a sum of money, as an inducement for a *future* separation of a man from his wife, would be contrary to law. But the difficulty is to point out upon these pleadings that this illegality is sufficiently alleged.

It appears clearly from the declaration, that a deed of separation had been prepared before the agreement declared on; for the first statement in the agreement, on which the plaintiff proceeds, speaks of enlarging the time mentioned in such deed of separation; and it speaks also of the annuity mentioned in it, which may probably be taken to be an annuity to be paid by the plaintiff to his wife. The engagement of the defendant to pay the sums mentioned in his agreement is then stated to be on the consideration of the plaintiff's *executing this deed of separation*, and taking on himself the payment of certain debts.

All this is quite consistent with a previous separation already agreed on between the husband and wife; and there is nothing that I can see illegal after husband and wife have actually separated, upon certain terms mutually agreed between them, in a third person's undertaking to pay certain debts in order to induce the husband to execute a deed of separation, and thereby secure to the wife the advantages so stipulated for at the antecedent time when their actual separation took place.

If all this be consistent, and I think it is, with the facts stated on this record, there is nothing shewn to be illegal in the consideration for the defendant's agreement. If there had been no previous separation, and it was in truth a bargain for a separation in future, the defendant should have stated that affirmatively in pleading. For illegality is not to be presumed; but unless the contrary be expressly alleged upon the record, we ought to assume that the parties have acted in conformity to the law.

For these reasons, I think that the judgment of the Court of *Common Pleas* ought to be affirmed.

LITTLEDALE, J. concurred with *Patteson*, J., and *Alderson*, B., in affirming the judgment of the Court below, upon the grounds stated by them.

Lord ABINGER, C. B.—In this case the declaration sets forth two considerations for the promise to pay a sum of money to the plaintiff: the first is, that the plaintiff should pay certain debts, and discharge certain expences; the second, that he should execute a deed of separation from his wife.

The plea is applied to the first of these considerations only, and alleges that the debts were due from the plaintiff, and that he was bound to pay the expences in question: upon the other consideration it is silent. To this plea there is a demurrer, upon which two questions arise; first, whether the payment of, or the promise to pay, a debt to which the party promising is already liable by law, is a good consideration for a promise to him of money or other advantage; secondly, if it be not, whether the executing a deed of separation from his wife is a lawful consideration for a promise to pay money to the husband. If both these questions are to be answered in the negative, the plea is good, because it alleges a sufficient answer to the only consideration upon which the declaration can be sustained, and because there is no occasion to make any answer to the other part of the consideration, which is illegal. Now, a consideration to support a promise must either operate to the advantage of the party making the promise, or to the detriment of the party who is to perform the consideration. But a man is under a moral and legal obligation to pay his just debts. It cannot, therefore, be stated, as an abstract proposition, that he suffers any detriment from the discharge of that duty; and the declaration does not shew in what way the defendant could have derived any advantage from the plaintiff paying his own debts. The plea, therefore, shews the insufficiency of that part of the consideration.

With regard to the other consideration, to which the plea does not apply, it has been argued, that as the law will recognize the legality of deeds of separation by allowing actions of covenant to be maintained upon them, it cannot be presumed that they are illegal; and that if they be not illegal, of course the execution of such a deed by the husband cannot be illegal. Now this proposition must at least receive this qualification; that the consideration which prevails on the husband to make such a deed be a good consideration in law to justify him in separating from his wife. There are certain circumstances which will induce the *Ecclesiastical Court* to pronounce a decree of divorce *a mensâ et thoro*; and it may not be unlawful for a man, under the same circumstances, voluntarily to agree to do that which the law, if he refused, would compel him to do. Upon this ground, a deed of separation, made upon due consideration, may well be considered as not unlawful. But

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the question is very different, whether it be lawful in a husband to separate from his wife in consideration of a sum of money. It cannot be doubted that the separation between husband and wife, without adequate cause, is both against the law of God, and against the policy of every civilized society. The circumstances, therefore, which justify a separation, as they only justify an exception to a very important general rule, ought not to be presumed. But whether they might be presumed or not, in support of a deed of separation *already executed*, it cannot be maintained that the receiving a sum of money by the husband is one of those circumstances, much less a circumstance which alone would justify a separation. The record in this case, when stripped of the superfluous matter which has been disposed of by the plea, presents nothing more than the naked fact of a separation by a husband from his wife, in consideration of a sum of money.

It is not necessary, for the purpose of this investigation, to review the cases which have been cited upon this subject; it is enough to say, that none of them has gone the length of deciding that a deed of separation, reciting, as the only consideration of the husband's agreement to separate, the payment of money to him, would be a lawful deed. If such a deed would not be lawful, how can it be maintained that it would be lawful for the husband to accept money, or the promise of money, as the consideration for signing a deed of separation? In this case, no other consideration appears, and the Court is not bound to presume any other in support of an agreement which is against the general rule of law, and can only be good, by way of exception, under special circumstances. But, in truth, pecuniary advantage to the husband ought to form no part, and can therefore form no legal part of a consideration for a separation from his wife. Either the circumstances are such as to make of themselves a good consideration for executing the deed, or they are not. If they are, the addition of money forms no part of the legal consideration; if they are not, the addition of money cannot make them so. Therefore, whether the Court be at liberty or not to presume, in the absence of all suggestion upon the subject, that there might have been a lawful cause for the husband to separate from his wife, it is certain that the promise of money to be paid to him cannot have been a lawful inducement, whether it was the exclusive or the partial consideration upon which he agreed to execute a deed of separation.

The judgment, therefore, ought to be reversed.

Lord DENMAN, C. J.—This declaration states a promise to pay a sum of money to the plaintiff's use, in consideration of his taking upon himself certain debts and liabilities, and executing a deed of separation from his wife. The defendant pleaded, that the debts were due from the plaintiff himself, and that he was already liable to pay them; consequently, that his undertaking to pay them could form no consideration for the defendant's promise. To this plea there was a demurrer; but it was admitted that the latter part of the consideration came to nothing, and that the sole consideration for the promise to pay money was the execution of a deed of separation. The declaration was therefore questioned on this ground.

It was first urged in its support, that, as some deeds of separation may be legal, this may be presumed legal, from the defendant's having pleaded; and reference was made to the authority of *Bayley* and *Holroyd*, Js, 6 *B.* &

C. 295 (*v*), for the doctrine, that, in any pleading where a fact is ambiguously stated, the adverse party, by pleading over, shall be taken to admit it in the most favourable sense of which it is capable (*w*). I apprehend, however, that this rule must be restricted to cases where the pleading over directly refers to such ambiguous matter, and answers it by introducing something new. But here, the pleading over is confined to other facts; the statement of this part of the contract is not noticed in the plea, but remains with all its faults, and advantage may be taken of them by a writ of error. If, however, this rule could be applied to the present case, the most favourable sense for the plaintiff that can be assigned to his declaration is this; that an instrument, providing for the separation of him and his wife, had been prepared, under which an annuity was to be paid to the wife; and that, in consideration of his executing that instrument, the defendant undertook, and promised to pay money for the plaintiff's use and benefit.

Some of the judges of the *Common Pleas* appear to have thought that the declaration farther stated, that the plaintiff had previously entered into an agreement to execute the deed; and farther, that the annuity was to be paid by him. Neither of these facts can I discover on the record, though the latter is probable in fact. Perhaps they would not materially vary the question, for the result would equally be, that the plaintiff, when free to execute or refuse to execute a deed of separation from his wife, had been induced to execute it by the promise of money. For breach of that promise, the present action is brought; and the single question is raised, whether the execution of such a deed be a good consideration for a promise to pay money to the husband.

That deeds for the separation of married persons may be valid and effectual, for certain purposes, many decisions have established; *Lister's Case* (*x*), and *Mead's Case* (*y*) shew that they will be taken notice of by Courts of law where separation has been rendered necessary for the wife's protection, by cruelty and ill-usage on the husband's part; and even in equity, deeds securing a separate maintenance for the wife, which had been rendered necessary by the husband's misconduct, were upheld in the three cases of *Oxendon* v. *Oxendon*, *Nicholls* v. *Danvers*, and *Williams* v. *Callow*, all reported in 2 *Vernon* (*z*). Most probably *Seeking* v. *Crawley*, in the same volume (*a*), proceeded on the same ground. Again, if a third person take upon himself the maintenance of the wife, while separated from her husband, the husband has been held compellable to pay the sum which, on that consideration, he bound himself to pay to the trustee, *Gawden* v. *Draper* (*b*); and a husband's release to such trustee, on the same consideration, of his remainder in an estate, was held by Sir *William Grant* to be good, even against the assignees of that husband when a bankrupt, *Worrall* v. *Jacob*.

(*v*) 9 D. & R. 249. *Hobson* v. *Middleton*.

(*w*) The doctrine laid down by *Bayley*, J., in that case, was mentioned as an exception to the *general rule* in pleading, that an equivocal expression shall be construed against the parties using it (See Steph. on Plead. 421, 2d ed., and authorities there cited;) and the learned judge referred to *Avery* v. *Hoole*, as supporting that doctrine: that case, however, only establishes that an ambiguity in pleading is cured by *verdict*.

(*x*) 8 Mod. 22.

(*y*) 1 Burr. 542.

(*z*) *Oxendon* v. *Oxendon*, 2 Vern. 493; S. C. (nom. *Rockingham* v. *O.*) Pr. in Ch. 239; *Nicholls* v. *Danvers*, 2 Vern. 671; *Williams* v. *Callow*, Id. 752.

(*a*) Pa. 386.

(*b*) 2 Ventris, 217.

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That the husband himself may derive protection against debts incurred by his wife while living apart from him, by shewing that he had agreed with a trustee to provide adequate funds for her maintenance, and had in fact provided them, is clearly established by several cases, particularly by that of *Nurse* v. *Craig* (*c*), a decision unanimous on that point, though Sir *James Mansfield* differed from the opinion that it was necessary for the husband to pay the money agreed for. Yet, the assertion that deeds of separation are at variance with the policy of the law, has been often made by the highest authorities, and never disputed by any. Many of the judges who have given effect to them, for any purpose, have expressly declared that they adopted them to that extent with reluctance, and would have paused if the question had been new; Lord *Rosslyn*, in *Legard* v. *Johnson* (*d*), Lord *Eldon*, in *Beard* v. *Webb* (*e*), and in *St. John* v. *St. John* (*f*).

Sir *W. Grant* pointedly declares it to be now settled, that "the Court of Chancery will not carry into effect articles of separation between husband and wife. It recognizes no powers to vary the rights and duties growing out of the marriage contract, or to effect at their pleasure a partial dissolution of that contract." And in establishing the husband's conveyance of property, in consideration of the trustees undertaking to indemnify him against the wife's debts, he adds, "it does seem rather strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law." But the validity of the principal agreement is now in question before us: if it is not valid and binding, the husband's execution of it cannot be a good consideration for a third party's promise to pay him money.

There appears to be a strange inconsistency in pronouncing a deed to be valid, and admitting at the same time that it cannot be enforced; or in contending that it might be the foundation of a suit at law, while it notoriously supplies no ground for a specific performance, because equity regards it as contrary to public policy. But beyond that objection, in point of principle, the legal relation of the parties creates great difficulties; and the question may be again asked, as it was by Lord *Eldon* in several cases, on whom *can* the contract be binding? Not on the wife, for she cannot contract with her husband, or execute a deed. Not on the husband, unless a third party may sue him for a breach of covenant in performing the duties of a husband towards his wife. Reverse the present case, and suppose that the husband had accepted the money on a promise to execute the deed, and had been sued for a breach of promise, could an action for damages have been maintained? If not, it seems to follow that the execution of a similar deed cannot form the legal consideration for a promise to pay money.

I am aware of the case of *Lord Rodney* v. *Chambers* (*g*), which determines that an action will lie against a husband, having executed a deed of separation, for the sum which he contracts to pay to trustees, in case of a future separation, subject to their approval. But this decision has received some severe shocks from the strictures of Lord *Eldon*, in *St. John* v. *St. John*, and must be considered as directly overturned by the *King's Bench* in *Hindley* v.

(*c*) 2 N. R. 148.
(*d*) 3 Ves. 358.
(*e*) 2 B. & P. 93.
(*f*) 11 Ves. 526.
(*g*) 2 East, 283.

Lord Westmeath (*h*), though it is difficult to explain why a present separation is less contrary to public policy than the agreement to give effect to one, if rendered necessary by circumstances, at a future time.

I am also aware of the case of *Jee* v. *Thurlow* (*i*), where the Court of *King's Bench* sustained a covenant made by a husband to pay an annuity to the wife's trustees under a deed of separation. Lord *Tenterden*, C. J., and *Bayley*, J., certainly thought themselves bound by decisions which have, to a certain extent, recognized such deeds; but the other two judges were cautious in their expressions: and the opinion of *Holroyd*, J., is remarkable, in looking to the trustees' covenant to indemnify, as the basis of the husband's obligation; indeed, their covenant being, as he particularly remarks, not limited to the period of separation.

I have also carefully examined the numerous cases cited in Mr. *Jacob's* edition of *Roper's Law of Husband and Wife*, and the able commentary upon them. Some of them were avowedly, and doubtless more of them actually, brought before the Courts of equity, by consent, for the purpose of obtaining directions on the effect of similar deeds, without disputing their legality. Some of them I take to be undoubtedly erroneous; such as *Hoare* v. *Hoare* (*j*), decided in the House of Lords, where the stipulation of a marriage settlement for the contingency of the parties separating was upheld. If I could venture to lay down the principle which alone seems to be safely deducible from all these cases, it is this; that *when a husband has by his deed acknowledged his wife to have a just cause of separation from him, and has covenanted with her natural friends to allow her a maintenance during separation, on being relieved from liability to her debts, he shall not be allowed to impeach the validity of that covenant.*

But even if the most questionable of these cases were good law, and deeds of separation binding for every purpose, both at law and in equity, all former decisions fall infinitely short of the present, where a promise to pay the husband a sum of money is a consideration for his executing the deed. This alone it is that substantially appears on the present record. Generally speaking, the lawfulness of a thing promised does not make it lawful to promise to do it for a money consideration. It is lawful to vote for a candidate at an election, but bribery to give or promise the voter money for so doing.

The same principle was illustrated by numerous authorities cited at the bar, and in the case of married persons contracting for their separation, which I take to be at least *primâ facie* illegal, where no circumstances by which it is legalized are set forth, and no justifiable motive is assigned; it appears to me to be a dangerous novelty to permit the abdication of conjugal rights, and the abandonment of marital duties, to be made the subject of money stipulation.

It is satisfactory, as well as proper, to add, that the purchase of a husband's consent to separation is admitted to be illegal, and this promise is held binding only, as it may be a part of the negociation which leads to a separation that may possibly be legal. But I am unable to distinguish the two cases; and I think the latter contract neither more nor less than an indirect mode of securing effect to the former.

Judgment affirmed

(*h*) 6 B. & C. 200; 9 D. & R. 351; 1 Dow. & Clark, 519.

(*i*) 2 B. & C. 547; 4 D. & R. 11.

(*j*) 2 Ridgw. Parl. Ca. 268.

MEMORANDA.

HILARY VACATION.

February 13th, *William Henry Maule*, Q. C., was made Serjeant, and gave rings with the motto "*Suum Cuique.*" On the same day he was appointed a Baron of the *Exchequer*, vice *Bolland*, B., resigned, and was knighted.

February, 22d, *John Stuart*, of *Lincoln's Inn*, *Robert Vaughan Richards*, of the *Inner Temple*, *Samuel Girdlestone*, of the *Middle Temple*, *Griffith Richards*, of the *Inner Temple*, and *William Goodenough Hayter*, of *Lincoln's Inn*, Esquires, were appointed Queen's Counsel.

A

DIGEST

OF THE

CASES REPORTED IN THIS VOLUME,

CONTAINING

THE DECISIONS OF THE COURT OF COMMON PLEAS,

FROM

HILARY TERM, 1838, TO HILARY TERM, 1839, INCLUSIVE.

ACCOUNT.

See EVIDENCE, I. (A).
ARBITRATION, 5.

ACCOUNT STATED.

See PLEADING, I. (B).

ACT OF PARLIAMENT.

See ACTION, 2.

CONSTRUCTION OF.

By a section in a local Act, incorporating a Railway Company, no action was to be brought against *any person* for anything done in pursuance of the Act, unless twenty days' notice should be given by *the party* intending to commence such action to the intended *defendant*:—*Held*, that the Company was included under the term "person," and entitled to notice, notwithstanding that, in numerous other sections, a distinction was made between "persons" and "corporations." *Boyd* v. *London and Croydon Railway Company*, 226.

ACTION.

1. *A.* entered into a written agreement *inter partes* with *B.* and *C.* (who were described therein as co-partners), to serve them for seven years, *D.* at the time being a dormant partner:—*Held*, that *A.* could not sue *D.* for a breach of such agreement. *Beckham* v. *Knight*, 71.

2. An Act of Parliament, incorporating a public company, directed that the costs of procuring the Act should be paid out of the first monies to be raised under it:—*Held*, *first*, that a party who had assisted in procuring the Act, might sue the company for remuneration, without shewing any retainer or employment; *secondly*, that the plaintiff need not expressly allege that his services were of any value to the defendants, as they had adopted the Act of Parliament procured by him; *thirdly*, that an allegation that the defendants had received monies, out of which they might have paid the plaintiff, was sufficient upon *general* (though it might not have been on *special*) demurrer; *fourthly*, that *debt* was a proper form of action. *Semble*, *Case* also would have lain. *Carden* v. *The General Cemetery Company*, 503.

3. Where a party enters into a joint and several contract with three others, two of whom have a joint interest, but wholly separate from that of the third, such two ought to sue, without joining the third. The defendant claimed a sum of money, as due from *J. M.*, deceased, which was also claimed by *W. M.*; the money being in the hands of *E.*, as attorney to the plaintiffs, (the executors of *J. M.*,) he paid it over, by their directions, to the defendant, who gave an indemnity, addressed to "Mr. *E.*, and also to Messrs. *P.* and *M.* (the plaintiffs), as the executors of the will of the late *J. M.*," in these terms: "I hereby undertake to indemnify and save *you and each of you* harmless from any claim that may be made against you" relative to the said sum of money. *W. M.* having become bankrupt, his assignees sued the executors for the sum in question, together with another demand. The present defendant was

apprized of the action, and it was defended with his concurrence, and the assignees obtained a verdict. The executors then sued the defendant, to recover the sum in question, and the costs of the former action:—*Held*, first, that the action was properly brought by the executors, without joining *E.*; and, secondly, that they were entitled to recover the whole of the costs of the former action, as they could not be apportioned. *Place* v. *Delegal*, 185.

ACTIONEM NON.

See PLEADING, I. (A.) (*a.*)

ADVERSE CLAIMS.

See SHERIFF, C.

AFFIDAVIT.

See MARRIED WOMAN, 1, 2.
BAIL, I.
AMENDMENT, I.
PRACTICE, XIV. (C. *a.*) 1; XVII.
PRISONER, 3.

Entitling an affidavit "*A. B., Assignee, &c.* v. *C. D.*,' is insufficient. *Engler* v. *Twysden*, 269.

AGENCY.

See EVIDENCE, II. (A.)

AGREEMENT.

See ACTION, I.
CHARTER PARTY.
LANDLORD AND TENANT, I. (B.)

ALIEN.

See PRACTICE, VII.

AMENDMENT.

See COSTS, II. 1, 6; IV. 1, 2.

I. OF AFFIDAVITS.

Affidavit of sufficiency of bail, not in compliance with R., T. 1 W. 4, allowed to be amended. *Du Burgh's Bail*, 371.

II. OF FINES AND RECOVERIES.

1. The Court ordered a recovery to be amended, by inserting the words "free warren," such right having been enjoyed with the estate since the time of *James* 1st, and having been intended to pass. *In the matter of Sir William Twysden*, 64.

2. The Court ordered the record of a fine, levied in 1830, to be amended, by endorsing the proclamations on the roll (where only one was entered,) there being a minute in the foot that all the proclamations had been duly made. *Lloyd* v. *Nicholas*, 237.

3. A fine levied at the *Cardigan* Great Session for 1830, ordered to be amended by indorsing the proclamations, it being shewn that two proclamations had been, in fact, made, and that it was the practice to make them all in conformity with 11 G. 4, & 1 W. 4, c. 70, s. 28. *Evans* v. *Davies*, 486.

III. OF PARTICULARS.

See PRACTICE, IV. D.

III. OF PLEADINGS.

1. The plaintiff in *assumpsit* claimed only the balance of an account; the defendant pleaded payment of a sum which had in fact been paid before the balance was struck; the plaintiff thereupon obtained leave to amend, by increasing the amount of his damages:—*Held*, that the defendant was not entitled to plead *de novo*, but that he should have applied to amend his plea. *Collins* v. *Aaron*, 54.

2. In *replevin*, the defendants avowed for three quarters' rent, at a yearly rent of 11*l.*, payable quarterly; the plaintiff paid into Court 7*l.*, as three quarters' rent, at a yearly rent of 10*l.* The jury found the rent was 11*l.* a year, payable half-yearly, and the finding was indorsed on the record. The Court allowed the defendants to amend their avowry, upon payment of costs, by changing the averment that the rent was payable "quarterly," to "half-yearly." *Gayler* v. *Farrant*, 101.

3. Where two plaintiffs had sued as public officers of a banking company, and by sec. 9 of the Banking Act (7 G. 4, c. 46,) the action should have been brought by one only, even though issue had been joined, the Court allowed the plaintiffs to amend (by striking out one of their names) upon payment of costs. *Holmes* v. *Binine*, 203.

ANNUITY.

See INSOLVENT.

APPEAL.

See JUSTICES OF THE PEACE.

APPOINTMENT.

See JUSTICES OF THE PEACE.

ARBITRATION.

See COSTS, IV. 3.

1. In an action, in which, by the pleadings, inconsistent issues were raised, a verdict was found for the plaintiff, and the cause was referred to an arbitrator, with liberty to certify:—*Held*, that he could not certify that a verdict should be entered *generally* for the defendant, but should have ordered the verdict to be entered in the same way that a jury must have found it. *Wolfe* v. *Hooper*, 199.

2. Where an arbitrator, after publishing his award, makes a statement, shewing that he has mistaken his jurisdiction, the Court will receive an affidavit of such statement. *Jones* v. *Corry*, 459.

3. Two actions by the same plaintiff against executors, one in their representative character, the other in their individual capacity, were referred to a barrister; he found that the plaintiff had no ground for the second action, but awarded him damages in the first, including a debt due from the testator's heir, who was a party to the reference. The arbitrator, upon being applied to by the defendant's attorney to state the grounds on which he had so awarded, said he had proceeded on the principle that he was to decide whether anything was due from the heir. Upon an affidavit of this statement, the Court *held* that he had exceeded his jurisdiction, and set aside the award. *Id.*

4. Where, by the terms of the reference, an award was to be made and *published* by a particular day, *semble*, that *execution* of the award, and *notice* to one of the parties, before that day, is a sufficient publication. *Id.*

5. Where an action of account, and all matters in difference, were referred to an arbitrator:—*Held*, that he was not limited to the functions of an auditor merely to find what was due between the parties, but that he was authorized to award the payment of the sum found due upon such an account. *Baxter* v. *Hozier*, 519.

ARREST.

See EVIDENCE, I. (C.)
COSTS, VII.
SHERIFF, A.

In order to constitute an arrest, it is not necessary that there should be actual contact of the defendant's person. *Grainger* v. *Hill*, 42.

ASSIGNATION.

See EVIDENCE, II. (C.)

ASSIGNEE.

See BANKRUPT, 1.
ESTOPPEL.

ASSUMPSIT.

See AMENDMENT, III. 1.
EVIDENCE, I. (B.)
PLEADING, II. (A.)

The alleged consideration for the defendant's promise to pay money to the plaintiff was the plaintiff's undertaking to *execute* "a certain deed of separation between himself and his wife," which deed had been already prepared:—*Held*, on error, that as nothing appeared to shew that the deed of separation was illegal, the Court would not presume its illegality, and that the consideration therefore was not illegal. (Judgment of *C. P.* affirmed, *per Littledale*, J., *Alderson*, B., and *Patteson*, J.; *dissentientibus*, Lord *Denman*, C. J., and Lord *Abinger*, C. B.) *Jones* v. *Waite*, 548.

ATTACHMENT.

See SHERIFF, B.
COSTS, II. 4.

Where, by the Master's *allocatur*, the plaintiff is ordered to pay the costs of the day "to the plaintiff," without adding "or his attorney," a demand by the latter is, nevertheless, sufficient, whereon to ground an attachment. *Mason* v. *Whitehurst*, 261.

ATTESTATION.

See COGNOVIT.

ATTORNEY.

See PRACTICE, I. (A. *c.*)
EVIDENCE, III.
COGNOVIT.
ATTACHMENT.
COSTS, III. 2, 3.
FOREIGN ATTACHMENT

1. EXAMINATION PREVIOUS TO ADMISSION.

See PRISONER, 1

The examiners of attornies, under *Reg. Gen., H.* 6 W. 4, ought not to refuse to exa-

mine a clerk, upon the ground that there is a doubt whether he has served his whole time under his articles. *In re Smithers*, 423.

II. ENROLMENT OF NAME.

Where an attorney has altered his name by royal licence, the Court will not order the Master to alter his name on the roll accordingly. *Ex parte Ware*, 119.

III. DELIVERY UP OF PAPERS.

Where a husband had paid the charges of the marriage settlement upon his wife, the Court ordered an attorney to deliver him the draft thereof, although the latter claimed to retain it as trustee. *Ex parte Holdsworth*, 189.

IV. COSTS.

1. Where an attorney, not admitted in *C. P.*, commenced an action there before the Statute 7 W. 4, and 1 Vic. c. 56, came into operation:—*Held*, he was only entitled to his costs subsequently to that time. *Newton* v. *Spencer*, 10.

2. An attorney's bill, for business done at the *Central Criminal Court*, is within the 2 G. 2, c. 23, s. 23; and, therefore, the superior Courts have authority to order such bill to be taxed. *Curling* v. *Sedger*, 262.

3. Where less than one-sixth has been taxed off an attorney's bill, under 2 G. 2, c. 23, s. 23, the Court is bound to exercise their discretion as to allowing the attorney the costs of taxation, according to the reasonableness of the bill. *Russell* v. *Yorke*, 507.

AUCTION.

See LANDLORD AND TENANT, I. (A.) 2.

By Stat. 17 G. 3, c. 50, s. 8, a vendor who sells by auction, may make it a condition of sale that the purchaser shall pay the auction duty, and that in case of his refusal to do so, his bidding "shall be null and void to all intents and purposes:"—*Held*, that a bidding is *not absolutely void* by the refusal of a purchaser to comply with such a condition of sale, but *voidable only at the option of the vendor*; and that the purchaser cannot insist upon such refusal to avoid the contract. *Malins* v. *Freeman*, 177.

AUDITOR.

See ARBITRATION, 5.

AWARD.

See ARBITRATION

BAIL.

See AMENDMENT, I.
BANKRUPT, 5.
PRISONER, 2, 4.

I. GENERALLY.

1. An affidavit of justification of bail, stating deponent was possessed of stock in certain funds (describing it,) standing in the names of deponent and another, but which the deponent was solely entitled to:—*Held*, sufficient. Such affidavit, however, being insufficient, by reason of its omitting to state the *number* of the residence of one of the bail (in contravention of R., T. 1 W. 4, s. 2,) and also by reason of its stating that the deponent was worth the requisite amount *over and above* (omitting *what would pay*,) *his just debts* (in contravention of R., H. 2 W. 4, r. 19):—*Held*, neither plaintiff or defendant was entitled to costs. *Keough's Bail*, 243.

2. The Court refused to enter an *exoneretur* on the bail-piece, where the defendant was in *Scotland*. *Dalton* v. *Gibb*, 398.

3. Proceedings on a bail-bond stayed upon terms, where there had been a former action and verdict against one of the bail. *Dawes* v. *Salomonson*, 389.

II. PAYMENT OF MONEY INTO COURT IN LIEU OF BAIL.

A *capias* having issued against the defendant for 200*l.*, he deposited that sum, and 10*l.*, in the hands of the sheriff, under the 43 G. 3, c. 46, s. 2. He afterwards offered to pay into Court an additional 10*l.*, under the 7 & 8 G. 4, c. 71, s. 2; but the officer refused to receive it till the former sums were paid in; by the fault of the sheriff's officer they were not so paid in till the evening of the last day upon which bail could be put in. On the day following, the defendant paid in the additional 10*l.*; and on the same day the plaintiff obtained a rule *nisi* for payment over to him of the sums paid in by the sheriff, which was afterwards made absolute:—*Held*, that the defendant was not entitled to have back the sums which had been paid over to the plaintiff, and that the payment of the second sum could not, under the circumstances, be considered as equivalent to putting in and perfecting special bail. *Hannah* v. *Willis*, 117.

BANKER'S CHECK.

On the 28th of *March*, the defendant having a check upon a banker at *Bath*, got it cashed at a branch of the *North Wilts* Bank, at

Malmesbury. It was forwarded, and arrived the same day at the chief office of the Bank at *Melksham*, where it was detained till the night of the 30th, when it was forwarded by a private hand to *Bath*, and presented there on the 31st, and dishonoured:—*Held*, that the delay in the presentment, on the part of the *North Wilts* Bank, amounted to laches, and that they could not recover against the defendant. *Moule* v *Browne*, 79.

BANKRUPT

See TROVER, 3.
COSTS, III. 1.
EAST INDIA COMPANY.
EJECTMENT, I. 2.
PLEADING, I. (A. *b.*); II. F. 2.
LANDLORD AND TENANT, III
PRACTICE, IV. A.; XIV.

1. The estate of *A.* (a bankrupt,) under a second commission, did not pay 15*s.* in the 1*l.* *A.* subsequently continued to trade, and was in possession of stock to a considerable amount; the assignees under the second commission never interfering, or in any way claiming such stock. *A.* afterwards rendered to prison. A third commission (or *fiat*) issued against him, and he subsequently petitioned the Insolvent Court, made the usual assignment of his property to the provisional assignee, and was discharged. The assignee under the *fiat* seized the stock in trade of *A.* In an action of *trover* by the assignees under the second commission, against the assignees under the *fiat*, for the conversion:—*Held*, *first*, that the stock in trade having vested in the plaintiff (by virtue of the 127th section of the Bankrupt Act,) he was the "true owner" of such property. *Secondly*, that such property passed to the provisional assignee, by virtue of the 30th section of the Insolvent Act, as having been in *A.'s* possession at the time of his arrest, by the consent of the owner. *Thirdly*, that upon an issue, whether the plaintiff was possessed of the property as assignee, it was competent to the defendant to set up the title of the provisional assignee. *Quære*, whether such *fiat* was valid. *Butler* v. *Hobson*, 93.

2. Where a bankrupt's estate has not paid 15*s.* in the pound under a second *fiat*, a third is not a nullity. *Butler* v. *Hobson*, 424.

3. Unless the estate of a bankrupt, existing at the date of the certificate obtained under a second *fiat*, shall have actually produced sufficient to pay 15*s.* in the pound, his subsequently acquired estate vests in the assignees under such *fiat*. *Id.*

4. *A.* held a policy of insurance as a security for a debt due from *B.*, and refused to join in a composition deed, unless the policy were assigned to him. Upon the policy being so assigned, *A.* executed the composition deed. The policy was paid to *A.*, but the full amount of the composition was not paid: *B.* became bankrupt:—*Held*, that his assignees might recover the amount of the policy from *A.* *Alsager* v. *Spalding*, 181.

5. A trader, on being arrested by a creditor (after having committed a secret act of bankruptcy,) deposited the debt, and 10*l.* for costs, in the hands of the sheriff, under 43 G. 3, c. 46, s. 2, which sum was afterwards paid into Court. Bail not having been perfected in due time, the creditor obtained an order for the payment of the money over to him, under the same Statute. A *fiat* of bankruptcy was subsequently issued against the trader:—*Held*, that the payment to the creditor was made under process of law, and was, therefore, protected against the assignees. *Reynolds* v. *Wedd*, 230.

6. An advance of money to a trader upon a deposit of goods made after a secret act of bankruptcy, but within two months before the *fiat*, is not protected, as a *payment*, under the 82d section of the Bankrupt Act. *Wright* v. *Fearnley*, 413.

BARRISTER.

See PRACTICE, III. A. 1.

BILL OF EXCHANGE AND PROMISSORY NOTE.

See BANKER'S CHECK.
PLEADING, II. (A. *b.*) 4, 5, 6.

I. GENERALLY.

See PRACTICE, VI. A. 2.

A. (being in partnership with *B.*) was indebted to the plaintiffs on his private account in 800*l.*, and it was agreed that the plaintiffs should lend 2,600*l.* to *A.* and *B.*, upon the security of a mortgage, and of a promissory note to that amount, to be given by a third party; and that the 800*l.* should be deducted out of the 2,600*l.* In the mortgage deed was a recital (which was untrue in fact,) that the 800*l.* had been paid: the defendant gave his joint and several note for the 2,600*l.*, and at the time of making it, the recitals of the deed were read over in his presence by the plaintiffs' agents:—*Held*, that this amounted to a fraud in law, and that the note given by the defendant was thereby rendered unavailable against him. *Stone* v. *Compton*, 436.

II. LIABILITY OF PARTIES.

The liability of the maker of a promissory note, given to secure the debt of a third party,

is the same as that of a party who gives a regular guarantee. *Stone* v. *Compton*, 436.

III. Notice of Dishonour.

1. The drawer of a bill of exchange, upon being applied to by the holder for payment, some months after the bill had become due, said, "you ought to press *F.* (the acceptor,) if he does not pay I must;" he afterwards endeavoured to raise money to meet the bill: —*Held*, upon an issue, whether or not the drawer had received notice of dishonour, that the above circumstances amounted, at most, only to presumption of notice, and that it was properly left to the jury to find whether or not notice had been given. *Hicks* v. *The Duke of Beaufort*, 55.

2. Upon the dishonour of a bill of exchange, the plaintiffs (indorsees) wrote to the defendant (a previous indorser,) "we are surprised to hear that Mrs. *G.'s* bill (the one in question) was returned to the holder unpaid;" afterwards, in the same day, the defendant saw the plaintiffs, and said, "he was much surprised the bill was not paid, and that he would write to the parties and see it paid:—*Held*, sufficient to satisfy the averment that the defendant had received notice of the dishonour. *Houlditch* v. *Cauty*, 162.

IV. Delivering up.

1. An action having been brought against an indorser of a bill of exchange (which had been fraudulently negociated,) the Court ordered it to be given up to the acceptor, upon payment by him of the amount of the bill, and all costs of the action. *Davis* v. *Tunnicliffe*, 223.

2. The Court refused a rule that a bill of exchange should be given up to the acceptor, upon payment of the amount and costs, exclusive of the costs of a particular rule in the cause. *Hannah* v. *Willis*, 378.

BILL OF LADING.

See Pleading, II. (A. *a.*)

There is no general rule of law which governs the delivery of goods by ship-owners, under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of the delivery. *Gatliffe* v. *Bourne*, 120.

BRIBERY.

See Evidence, I. (E.) 2, 3.

BROKER.

See Frauds, Statute of.

CARRIERS.

See Pleading, II. (A. *b.*) 3.

CAPIAS.

See Practice, I. A.

CASE.

See Nuisance.
Pleading, II. (B.)
Evidence, I. (C.)
Insurance, I.
Lanlord and Tenant, I. (D.)

CERTIFICATE.

See Arbitration, I.
Costs, VI.
Covenant, 2.
Executor.
Speaker's Certificate.

CHARTER-PARTY.

See Evidence, I. (B.)

Assumpsit. The declaration stated that, by a *charter-party* made on the 2d *December*, it was agreed, between the plaintiffs and defendant, that a ship, belonging to the former, then at *P.*, should, with all convenient speed, sail to *C.*, and there take in a cargo of coals and iron, and proceed therewith to *A.*, "forty running days to be allowed for loading the ship at *C.*, and unloading at *A.*, *to commence on the 16th December*, and ten days on demurrage, over and above the said laying days, at 7*l.* per day;" that afterwards, on the 2d *December*, the ship then being at *P.*, *by and with the consent of the plaintiffs and defendant, and at the request of the defendant*, the ship remained at *P.* till the 17th *December*, for the purpose of taking in the cargo of coals, instead of being loaded therewith at *C.*; that the ship arrived at *C.* on the 18th *January*, and there remained taking in her cargo of iron till the 2d *February*, when she set sail for *A.* *Breach*, that defendant kept the ship at *C.* twenty days over and above the lay-days and days of demurrage mentioned in the charter-party, and would not pay demurrage in respect thereof. The jury found that the ship remained at *P.*, for the purpose of taking in the coals, *at the request of the plaintiffs, and with the consen'*

of the defendant, and gave the plaintiffs a verdict for the *extra* twenty days the ship was detained at *C.*:—*Held*, *first*, that this finding supported the issue; *secondly*, that the substitution of *P.* for *C.*, as the place where the coals were to be shipped, was a new agreement, varying the original contract as to the *place* of loading, but that the contract remained unaltered as to the *number of lay and running days*, and, therefore, that the jury were right in allowing for the twenty *extra* days. *Jackson* v. *Galloway*, 408.

CHURCHWARDENS.

See EVIDENCE, I. (F.)

COAL.

See LANDLORD AND TENANT, I. (D.)

COGNOVIT.

An attestation of a *cognovit*, on the part of the defendant, by *F.*, an attorney, who acted as attorney for the plaintiff's son, a clerk in the office of *H.*, the plaintiff's attorney, and who afterwards indorsed the *cognovit* "*F.* for *H.*," *Held* insufficient. *Price* v. *Linstead*, 381.

COMMISSION TO EXAMINE WITNESSES.

See PRACTICE, XIV. A.

COMMON PER CAUSE DE VICINAGE.

See PLEADING.

COMPANY.

See COVENANT, 2.
EAST INDIA COMPANY.
ACTION, 2.
ACT OF PARLIAMENT.

COMPENSATION.

See SALE, II. 2.

COMPOSITION.

See EVIDENCE, II. (C.)
BANKRUPT, 4.

CONSIDERATION.

See ESTATE TAIL.
ASSUMPSIT.
PLEADING, II. (A. *b.*) 1.

CONTRACT.

See AUCTION.
CHARTER-PARTY.
EAST INDIA COMPANY
PAWNBROKER.
ACTION, 1, 3.
PLEADING, II. (A. *b.*) 1, 2, 3.

I. GENERALLY.

Wine was sold in bottles to the defendant. The bottles were charged in the invoice, but the defendant said he would arrange to return them to the plaintiff; they were not, however, returned. The plaintiff having recovered for the amount of the bottles, the Court refused to disturb the verdict. *Wood* v. *Brenton*, 417.

II. RIGHT TO RESCIND.

1. *A.* being the occupier of a hotel, for which he had omitted to procure the requisite licence, assigned the hotel to *B.*, and undertook to procure a licence by a certain day, or to forfeit a sum of money deposited with a stake-holder. Notice was given to both to attend before the magistrates on the licensing day, but *B.* neglected to attend, in consequence of which the licence was refused:—*Held*, that *A.* was entitled to have back his deposit money. *Held* also, that it was incumbent upon the defendant to give the notices required by the 14th sec. of the Licensing Act, 9 G. 4, c. 61. *Bryant* v. *Beattie*, 65.

2. By particulars of sale, lot 12 was described as a cottage, with a right of carriage and foot way over lot 13, as shewn upon a plan annexed to the particulars; and the lot was stated to be subject to liberty for the purchaser of lot 1 to come upon the premises to repair certain mains, drains and sewers; lot 13 was described as "a first-rate building lot of freehold ground," and was stated to be "subject to the same rights of way and passage, and other rights and easements over the same, as are now enjoyed under the existing leases of the *Crescent* houses (comprised in other lots,) and subject to a similar reservation for the purchaser of lot 1, in respect of the main, &c., as is made out of lot 12." It was also stated, that the lease of lot 7 (one of the *Crescent* houses,) might be seen at the vendor's offices, and would be produced at the sale. The tenants of all the "*Crescent* houses" had, under their leases, a right of way across lot 13, which was *not marked in the plan*. By the 9th condition of sale, it was provided, that if any mistake

were made in the description of the premises, such mistake should not annul the sale, but a compensation should be given. The plaintiff having purchased lots 12 and 13, for separate sums, but by one contract:—*Held, first*, that the existence of the right of way was not sufficiently disclosed; *secondly*, that it was not a case for the application of the compensation provision; and, consequently, as both lots were purchased by one contract, that the plaintiff was entitled to rescind the whole of such contract. *Dykes* v. *Blake*, 209.

CONVERSION.

See TROVER, I.

COPYHOLD.

See DEVISE.
MARRIED WOMAN, 3.

CORNWALL.

See COVENANT, I.

CORPORATION.

See EAST INDIA COMPANY.
ACT OF PARLIAMENT.

COSTS.

See SHERIFF, 3.
PLEADING, 4.
BILL OF EXCHANGE, IV.
EJECTMENT, III.
PRACTICE, XIV. E.
ACTION, 2
ATTACHMENT.
ATTORNEY, IV..

I. GENERALLY.

The Court will not make a prospective order that the Master shall tax the costs in a particular manner. *Rowe* v. *Cobham*, 152.

II. INTERLOCUTORY.

1. A judge at chambers, upon an application to amend a declaration, has authority to fix the costs of the amendment. *Collins* v. *Aaron*, 54.

2. The defendant being sued for 16*l.*, offered 13*l.*, which was refused; he then obtained an order to pay 11*l.* 8*s.* into Court, and that the plaintiff should not have any subsequent costs. The defendant was afterwards applied to to pay the money into Court, but neglected to do so, and the plaintiff delivered a declaration; the defendant then paid the money into Court, and the plaintiff took it out:—*Held*, the defendant was entitled to his costs from the time of the offer of payment. *Parsons* v. *Pitcher*, 141.

3. Where a stake-holder pays money into Court under an interpleader rule, and one of the litigant parties makes default in prosecuting his claim, the stake-holder was held entitled to his costs out of the fund. *Pitchers* v. *Edney*, 267.

4. Costs incidental to an attachment are considered as costs of the attachment itself; therefore, where an attachment had been obtained, but was suspended by agreement that an inquiry as to certain matters should take place before the Master, and ultimately the attachment issued:—*Held*, that the costs of the inquiry were costs of the attachment. *Tyler* v. *Campbell*, 465.

5. On 14th *June*, an interlocutory rule, obtained by the plaintiffs, was discharged with costs. On 13th *July*, they signed judgment for want of a plea; and the defendant, to avoid execution, paid the debt and costs, insisting that he was entitled to set off the costs of the rule, but making no formal demand for them; the Court, on motion, ordered the plaintiffs to repay the costs of the rule. *Abernethy* v *Paton*, 468.

6. In *trover* by the assignee of an insolvent, laying the property in the plaintiff, he obtained an order, on the morning of the day fixed for trial, to amend his declaration by laying the property in the insolvent; whereupon the defendant elected that the cause should be made a *remanet*:—*Held*, he was entitled to the costs of the amendment, and to plead *de novo*, neither party paying the costs of the day. *Norcutt* v. *Mottram*, 535.

III. AFTER VERDICT.

1. In *trover* by the assignee of a bankrupt (under a second *fiat*,) where the defendant obtains a verdict upon an issue that the plaintiff was not possessed, as of his own property, as such assignee, &c., upon the ground that the bankrupt, at the time of taking the benefit of the Insolvent Act, subsequently to such second *fiat*, was in possession of the goods by the consent of the plaintiff:—*Held*, that the defendant was entitled to the costs of proving a third *fiat*, (under which he was assignee,) but not to the costs of proving that the bankrupt's estate, acquired *after* the certificate under the second commission, was sufficient to pay 15*s.* in the pound. *Butler* v. *Hobson*, 424.

2. Where a cause has been conducted by the clerk of the plaintiff's attorney, and the attorney was subpœnaed and called as a wit-

ness:—*Held*, the Master was justified in allowing the plaintiff the costs of the attorney as a witness. *Id.*

3. In an action to recover 1,000*l.*, involving the character of the parties, a new trial having been granted to the plaintiff on payment of the costs, and the Master having disallowed two briefs for counsel, and the attendance of the attorney in *London*, upon the ground that there were no witnesses in the defendant's brief, the Court directed a review of the taxation. *Madison* v. *Bacon*, 487.

IV. Several Issues.

1. *Debt* for work, goods sold, and on an account stated. *Pleas: first, nunquam indebitatus*, except as to 3*l.* 17*s.*, parcel of the sum mentioned in the second count. *Secondly*, payment into Court of 3*l.* 17*s.* The only claim applicable to the second count amounted to 5*l.*, and the plaintiff in his particulars gave the defendant credit for 1*l.* 3*s.* At the trial, the plaintiff failed in his proof under the first count, and no evidence was offered on the third, and the judge directed the jury, that, from the state of the record, they must find nominal damages for the plaintiff upon the second count. They found a verdict for the plaintiff generally, damages 1*s.* The prothonotary taxed the costs upon the principle that this verdict was essentially a verdict for the defendant upon all but the second count:—*Held*, that the verdict should have been so entered, and that it was competent to the judge who tried the cause to amend the *postea* accordingly. *Ernest* v. *Brown*, 2.

2. In an action for excessive distress, in which several distinct issues were raised, the jury returned a verdict for the plaintiff generally, and it was so entered by the associate, but the *postea* was afterwards amended by the judge's notes, and the verdict was entered for the plaintiff upon two issues only, and for the defendant upon the rest:—*Held*, that the defendant was entitled to have the costs of the issues found for him deducted from the plaintiff's costs, such issues not being immaterial. *Newton* v. *Harland*, 160.

3. An action (in which the declaration contained one count on a special contract to accept goods, and a common count for goods sold) was referred to a lay arbitrator, the costs being to abide the event of the award; the arbitrator ordered defendant to pay a certain sum to plaintiff, and found that certain of the goods (mentioned in the special count) were the plaintiff's property; the Master taxed the entire costs for the plaintiff:—*Held*, he was right in so doing, as at most it was merely *ambiguous* on the award, whether the arbitrator had taken the special count into consideration. *Rennie* v. *Mills*, 534.

V. Under Court of Requests' Acts.

(*a*) Generally.

1. Where the defendant applies to deprive the plaintiff of his costs under a Court of Requests' Act, and it appears by a copy of the writ of summons annexed to the defendant's affidavit that the action was brought for a sum which might have been recovered in such Court, the defendant need not swear to that fact. *Burton* v. *Campbell*, 104.

2. Where the defendant, in such an application, describes himself in his addition as of a tavern at *G.*, within the hundred of *B.*, and afterwards, in the body of his affidavit, states he was resident at the above tavern, this is a sufficient averment of residence within the hundred, and supersedes the necessity of a positive allegation that he resided within the jurisdiction. *Id.*

3. Where the defendant positively swears to the above facts, it is not sufficient for the plaintiff to deny them upon information and belief. *Id.*

(*b*) Particular Acts.

1. By the *Tower Hamlets* Court of Requests' Act (23 G. 2,) the commissioners have jurisdiction over debts under 40*s.*, and in any action for a debt under 40*s.* sued in any other Court, the plaintiff is to pay defendant his costs; and no suit for debts recoverable by that Act are to be brought in any other Court. By sec. 4 of 2 W. 4, c. lxv. (amending the former Act,) the jurisdiction of the Court of Requests is extended to 5*l.*, but by sec. 10 the commissioners are not to determine any cause where the suit is for any sum *being the balance of an account originally exceeding* 5*l.*; and by sec. 23, actions which might have been brought in the superior Courts before that Act, may still be brought there. The plaintiff sued a defendant (resident within the jurisdiction of such Court of Requests) in the superior Court for the balance of an account originally exceeding 5*l.*, and recovered only 1*l.* 10*s.*:—*Held*, the defendant was not entitled to his costs. *Green* v. *Bolton*, 142.

2. By sec. 44 of 6 & 7 W. 4, c. cxxxvij. (the *Westminster* Court of Requests' Act,) debtors "*residing* or *inhabiting*," or "*keeping any counting-house*, &c.," may be summoned before the commissioners, &c.; by sec. 86, "no action for any sum not exceeding 40*s.*, and recoverable in the Court of Requests, shall be brought against any person *residing* or *inhabiting* within the jurisdiction thereof." The Act gives no remedy to the defendant for his costs:—*Held*, *first*, that the Court could not give a defendant his costs, though the plaintiff had only recovered 10*s.* *Secondly*, that a defendant *keeping a counting-house* within the juris-

diction, could not avail himself of the 86th section. *White* v. *Seffert*, 132.

VI. Under 43 Eliz. c. 6.

1. Where a judge has once certified to deprive the plaintiff of his costs, under 43 El. c. 6, *query*, whether he has power to rescind his certificate? *Whalley* v. *Williamson*, 471.

2. But assuming he has such a power, it is at any rate too late to exercise it after the first four days of the Term following the trial. *Id.*

VII. Under 43 Geo. 3, c. 46.

1. The plaintiffs sold the defendant eight chests of tea, one of which turned out to be damaged; the plaintiffs made an allowance in respect of such damage, and afterwards arrested the defendant for 41*l.*, being the balance of the account, after deducting the allowance. At the trial, the plaintiffs recovered 30*l.* 15*s.* only, it being agreed they should have back the damaged chest, which was afterwards sold by them for 10*l.*, being only a trifle less than the amount claimed:—*Held*, that under these circumstances the defendant was not entitled to his costs under 43 G. 3, c. 46. *Clare* v. *Cook*, 81.

2. A defendant who seeks to recover costs under the 43 G. 3, c. 46, sec. 3, as having been arrested in too large an amount, is bound to shew that the plaintiff had not any reasonable or probable cause for arresting him in such amount; therefore, when a defendant being indebted partly upon a bill of exchange, and partly for goods sold (which latter claim however was barred by the Statute of Limitations,) had made several verbal admissions of his liability to the plaintiff, but afterwards successfully set up the Statute of Limitations as a defence to the action:—*Held*, that he was not entitled to his costs under 43 G. 3. *White* v. *Prickett*, 61.

3. The defendant was arrested for 347*l.*, upon an architect's bill; there was conflicting evidence as to the value of the work done, and the plaintiff recovered only 211*l.*:—*Held*, the defendant was not entitled to his costs under 43 G. 3, c. 46. *Day* v. *Clarke*, 385.

COURT OF REQUESTS.

See Costs, V.

COVENANT.

See Landlord and Tenant, I. (C.)
Practice, VI. A. 1.
Evidence, I. (D.)
Pleading, II. (C.)
Lease.

1. From 1671 to 1765, the duchy of *Cornwall* had granted successive leases of large estates to the family of *W. C.*, upon the payment of certain fines. In 1777, a new term was granted by letters patent to him for ninety-nine years, if three specified lives should so long live. In 1789, *W. C.* demised part of the premises to *I.* and *H.* for sixty-five years and one quarter, if the three lives should so long live: and covenanted, that if either of the lives should drop during the term, *he would apply for, and do his utmost endeavours to procure a renewal of the letters patent* for another life. Five-sixths of the interest of *I.* and *H.* became vested in the plaintiff. In 1828 (when the annual rack-rent value of the premises was 21,095*l.*,) one of the lives dropped, *W. C.* applied for a renewal, but the duchy demanding a fine of 64,210*l.*, he refused to pay it, and in 1833 presented a petition of right, and afterwards filed a bill against the Lords of the Treasury, which was ultimately dismissed. The other two lives dropped pending the suit. In an action upon the above covenant against the administrator of *W. C.*:—*Held*, *first*, that the fine was properly calculated on the rack-rent, and not on the receipts of the lessee; *secondly*, that the fine demanded not being unreasonable, there had been a breach of covenant incurred by the non-payment thereof; *thirdly*, that the covenant ran with the land; *fourthly*, that the covenant could be apportioned so as to enable the plaintiff, as assignee of five-sixths of the premises, to sue thereon. *Simpson* v. *Clayton*, 299.

2. The shareholders of a joint stock company, by deed, covenanted to pay their proportionate shares of such a sum as a committee should certify to be required, to discharge the debts of the company; and it was thereby agreed that such certificate should be conclusive. The committee, upon a sudden emergency, made a certificate of a sum required, and the defendant, a shareholder, paid 150*l.* as his proportion. The committee afterwards made another certificate to a much larger amount, the defendant's proportion of which amounted to 529*l.*; this sum was demanded of him by letter, but in a postscript it was stated that he would have credit for the 150*l.* already paid. The defendant being sued upon his covenant and the certificate for the 529*l.*, by one plea traversed the allegation in the declaration, that the committee had certified *as the fact was*, that the sum mentioned was required; and by another, alleged that the committee had fraudulently signed the certificate:—*Held*, that, upon the first issue, the defendant was not estopped by the certificate from shewing that more was demanded than was really due; and that, upon the second issue, the facts did not constitute a fraud in law. *Wilson* v. *Wilson*, *Wilson* v. *Steele*, 333.

CUSTOM.

See Foreign Attachment.
Pleading, II. (A. *b.*) 2; (B. *b.*)

DEBT.

See ACTION, 2.
EVIDENCE, I. (E.)
PRACTICE, X.

DECREE.

See EVIDENCE, I. G.

DEED.

See EAST INDIA COMPANY.

DELIVERY.

See PLEADING, II. (A. *b.*) 2.

DEMISE.

See LANDLORD AND TENANT, I. (A.); (C.) 3, 4.
POWER.

DEMURRER.

See PRACTICE, XIV. B.

DEPOSIT.

See CONTRACT, II. 1.

DEVISE.

1. A devise of copyhold premises, (where there was no custom to entail) to the testator's son, *J. S.*, (who was his heir at law) "and his heirs, but if he should die without leaving any child or children," then over to five illegitimate children of the testator:—*Held*, that *J. S.*, under this devise, took a conditional fee at common law, which merged the former estate in the possibility of reverter cast upon him by descent, (as heir at law of the testator,) and gave him the fee simple. *Doe*, dem. *Simpson* v. *Simpson*, 109.

2. A devise "to my sons *J.* and *J.* my *estate* that I now occupy, together with the factory, &c., thereon; except the house I now occupy, &c., which I give to my daughters, *M.* and *A.*, jointly, share and share alike:"—*Held*, that the daughters took all the testator's *interest* in the premises excepted. *Doe*, dem. *Knott* v. *Lawton*, 204.

3. Where a testator distinctly devises the whole of his residuary property, real and personal, to trustees, although the trusts may be difficult and complicated, yet, if they are not absolutely uncertain, the Court will give effect to the devise. *Barclay* v. *Collett*, 287.

4. A will, duly executed to pass realty, contained several specific devises and bequests, which were set out at length in eight schedules; by the second of which, certain property was devised in trust for the defendant, who was the testator's heir at law; the will proceeded as follows:—"All the rest, residue and remainder of my *real* and personal *estate* and effects, whatsoever and wheresoever, I give, *devise* and bequeath unto my said trustees, *their heirs*, executors, &c., in trust, to divide the same equally among my children, &c., upon the same trusts, and subject to the same contingencies and bequests over as their respective original legacies are subject and liable to, &c." There was no power to sell or lease in the clause. At the foot of the will, the testator subsequently added the following memorandum: "Having omitted to include my freehold house and premises in, &c., in the second schedule of my above will, as intended, I declare my will and desire to be, that the same shall be considered as included to pass to my said son *J. C.* (the defendant,) who, being my heir at law, will be entitled to the same by descent from me at my decease." This memorandum was signed by the testator, but attested by one witness only:—*Held*, that, as the above memorandum must necessarily be laid out of consideration, the house and premises in question passed by the residuary clause to the trustees, notwithstanding that the trusts were so complicated, as probably to compel the parties to have recourse to equity, in order to perform them. *Id.*

5. Devise of lands to *J. L.* for life; remainder to *M. H.* and *N. H* for their respective lives, share and share alike, and if either should die without leaving issue male, the whole to the survivor for life; and if *M. H.* should (after the death of *J. L.*) die before *N. H.*, leaving issue male, then one moiety to the sons of *M. H.* in tail male; and in default of such issue, to *N. H.* for life; remainder to his sons in tail male; and in default of such issue, to the testator's right heirs; and if *N. H.* should (after the death of *J. L.*) die before *M. H.*, leaving issue male, then one moiety to the sons of *N. H.* in tail male; and in default of such issue, to *M. H.* for life, remainder to his sons in tail male; and in default of such issue, to the testator's right heirs: and in case *M. H.* and *N. H.* should both die *without leaving issue male*, then to such person as, at the death of the survivor, should be testator's right heir:—*Held*, that upon death of *M. H.*, without issue, *N. H.* took an estate tail in remainder in the whole, expectant on the determination of the estate limited to *J. L.* *Franks* v. *Price*, 444.

6. *T. J. S.*, in 1768, devised certain estates

to his right and lawful heir, for the better finding out of whom he directed *advertisements to be published immediately* after his decease in the public papers; and certain legacies were directed to be paid by the heir at law, *within twelve months after testator's decease;* and if no heir at law was found, then he constituted *W. L. his lawful heir, on condition that he took the name of S.:—Held, first,* that the heir was not bound to claim within twelve months, nor within any period short of sixty years. *Secondly,* that the heirs of the testator's paternal great grandmother were to be preferred to the heirs of his paternal grandmother. *Davies* v. *Lowndes,* 450.

7. A testator devised his freehold estates to *M. S.* for life, for her sole use; remainder to her husband for life; remainder to the use of the heirs of the body of *M. S.* in tail; remainder to *A. M.* for life, with remainders over; and declared that all the aforesaid settlements were intended by him to be in strict settlement, with remainder to his own right heirs for ever:—*Held,* that *M. S.* took an immediate estate for life in the said estates, and an estate in remainder in tail general in the same lands, expectant on the determination of the estate for life, limited to her husband. *Douglas* v. *Congreve,* 538.

8. *T. J. Selby,* by will, dated 10 *August,* 1768, devised estates in fee in the following words: "*To my right and lawful heir at law,* for the better finding out of whom I direct advertisements to be published immediately after my decease, in some of the public papers." The estates were then made chargeable with the payment of the testator's debts, and of certain legacies, including some to a cousin by the mother's side (to whom he also subsequently devised an estate in fee.) The will continued thus: "All which debts, legacies, &c., I do hereby order and direct to be paid *by the said heir at law, within twelve months after my decease:* but should it so happen that no heir at law is found, I do hereby constitute *W. Lowndes* my lawful heir, on condition he changes his name to *Selby;* and I give the estates, &c. to the aforesaid *W. Lowndes,* subject to and chargeable with all the legacies, &c. before mentioned." *W. Lowndes* entered upon the premises, and held manor courts as lord; certain parties afterwards appeared, and claimed as heirs at law of the testator; but their claims having been judicially disallowed, in 1784, *W. Lowndes,* by the name of *W. Selby,* levied a fine, with proclamations. A writ of right having been brought against him, he obtained a verdict. Upon error brought:—*Held, first,* that the devise to the right and lawful heir at law did not require that such heir should be of the testator's blood; *secondly,* that *W. Lowndes* was in possession at the date of the fine, claiming in his own right; and that such fine was properly levied, and, consequently, that it operated as a bar, *but, thirdly,* at the trial of the writ of right, the grand assize having been misdirected as to the construction of the will, and having found a verdict generally for the tenant, that a *venire de novo* must be awarded. *Davies* v. *Lowndes,* 217.

DISCHARGE.

See EVIDENCE, II. C. INSOLVENT.

DISCONTINUANCE.

See PRACTICE, XIV. E.

DISHONOUR.

See BILL OF EXCHANGE, III.

DISTRESS.

See JUSTICES OF THE PEACE.

DISTRINGAS.

See PRACTICE, I. C.

DIVISIBILITY OF PLEA.

See PLEADING, II. (C. *b.*)

EASEMENT.

See WAY.

EAST INDIA COMPANY.

1. The *E. I. Company* is a corporation established partly for the purposes of trade, and partly for the purposes of government. *Gibson* v. *The East India Company,* 493.

2. A grant of a pension by the *Company* to a retired military officer is not a contract made by the *Company* in their trading character, and, consequently, does not fall within the rule that a trading company may make parol contracts in matters relating to their trade. *Id.*

3. Therefore, the grant of such a pension not being under seal, gives no right of action to the officer, nor, consequently, in case of his bankruptcy, to his assignees. *Id.*

EJECTMENT.

I. Service of Declaration.

1. Service on the tenant's servant, who stated the same thing had been tried to be done before, without success, and fixing a copy on the door of the dwelling, is sufficient to entitle the lessor of the plaintiff to judgment against the casual ejector. *Doe*, d. *Wright* v. *Roe*, 2.

2. Where a tenant has become bankrupt, service upon the person in possession under the *fiat*, and also upon the official assignee, is sufficient to entitle the lessor of the plaintiff to judgment against the casual ejector. *Doe*, d. *Baring* v. *Roe*, 2.

3. In ejectment for detached stables, service on the wife of the tenant at his dwelling-house, is sufficient. *Doe*, d. *Graff* v. *Roe*, 131.

4. Ejectment for a chapel. Service on the surviving lessees and the sextoness sufficient. *Doe*, d. *Kirk* v. *Roe*, 372. See also *Doe*, d. *Dickens* v. *Roe*, 387.

5. Where there are several tenants in possession, the affidavit of service should state that *each* was served. *Doe*, d. *Healey* v. *Roe*, 373. See also *Doe* v. *Roe*, 386.

6. Where there are several adjoining houses, and all the tenants have been personally served but one, who had left the premises, and a copy of the declaration had been fixed to the empty house, the Court granted a rule for judgment against the casual ejector. *Doe*, d. *Emery* v. *Roe*, 517.

II. Notice to Appear.

A rule for judgment against the casual ejector was obtained, where the notice was to appear in *Trinity Term*, and the declaration of the same Term. *Doe*, d. *Goodall* v. *Roe*, 240.

III. Judgment.

In country ejectments, the plaintiff is entitled to judgment after that Term in which the tenant is required to appear. *Doe*, d. *Barth* v. *Roe*, 257.

IV. Staying Proceedings in Second Action.

The Court stayed proceedings in a second action of ejectment until payment of the costs of a former one, the title being the same, although growing crops had been seized under the writ of possession in the first action, which were of sufficient value to cover such costs. *Doe*, d. *Chapman* v. *Bluck*, 537.

ELECTION.

See Evidence, I. (E.)
Sheriff, D.

ESTATE.

See Devise.

ESTATE TAIL.

An estate in tail, granted by Charles 2, to his natural son, the Earl of *Euston* (then an infant of nine years old), "in consideration of natural love and affection, and for divers other good causes and considerations."—*Held*, not to be within the Statute of 34 & 35 H. 8, c. 20, so as to prevent the tenant from barring the entail. *The Duke of Grafton* v. *The London and Birmingham Railway Company*, 363.

ESTOPPEL.

See Covenant, 2.
Foreign Attachment.

A sheriff's *warrant* (upon a *fi. fa.*) in the ordinary form, was delivered to *F. S.* who was the regularly appointed bailiff of the lord of a liberty within the county. The writ was executed by him within such liberty. Subsequently, a *mandate* (upon another *fi. fa.*, at the suit of another plaintiff against the same defendant) directed to the lord of the liberty, was also delivered to *F. S.* and executed by him. The defendant having become bankrupt, the assignees applied to have the proceeds of the two levies paid over to them. *F. S.*, under the direction of the legal adviser of his principal, paid over the proceeds accordingly, the assignees giving an indemnity to the latter; a rule having been obtained against the lord to return the *mandate* in the first action:—*Held*, the lord was precluded from denying that no *mandate* had been delivered to him. *Platel* v. *Dowse*, 38.

EVICTION.

See Pleading, II. (C. *a.*)

EVIDENCE.

See Bill of Exchange, III.
Charter-Party.
Landlord and Tenant, II.
Practice, III. B. 1.

I. In Particular Actions.

(A.) Account.

In an action of account, charging the de-

fendant as tenant in common with the plaintiff, of certain goods, *viz.*, as owner of one moiety, and as bailiffs to the plaintiff as to the other moiety; a plea, that the defendant rendered a reasonable account, is not satisfied by evidence that the defendant rendered an account in which he charged himself as factor to the plaintiffs for the whole. *Baxter* v. *Hozier*, 519.

(B.) Assumpsit.

See Practice, XII. 2.

In an action upon a charter-party for freight upon goods shipped at *Bombay* for *London*, stating that cotton was to be "calculated at *fifty cubic feet per ton*," *Held*, that evidence was admissible, *first*, on the part of the defendant to show a usage in the trade, that the measurement was to be calculated when the cotton was taken from a screw at *Bombay*, though it appeared that it afterwards expanded considerably before it was shipped, and again when it was unloaded at the port of delivery; *secondly*, on the part of the plaintiff, to show that the captain of the vessel refused to receive the cotton according to such measurement, and that he measured it when on board, and delivered an account of such measurement to the shippers. *Bottomley* v. *Forbes*, 431.

(C.) Case.

See Way, 4, 5.

Quære, where a party has been arrested who by law ought not to have been, whether in an action for a malicious arrest, it is necessary to show the determination of the former suit. *Bartrum* v. *Williams*, 108.

(D.) Covenant.

See Landlord and Tenant, I. (C.) 5.

In covenant for not leaving a house in repair, the defendant may shew the *general* state of the premises at the time of the demise, but he cannot go into *particulars*. *Young* v. *Mantz*, 198.

(E.) Debt.

1. In debt for penalties under the 2 G. 2, c. 24, s. 7, (the Bribery Act):—*Held*, *first*, that the allegation in the declaration that "the defendant corruptly gave *J. J.* 10*l.*" was sustained by proof that the defendant, being in an outer room, gave *J. J.* a ticket, and sent him into an inner room, where another person, upon production of the ticket, gave him 10*l.* *Webb* v. *Smith*, 145.

2. *Secondly*, that evidence of similar transactions between the defendant and other parties not named in the declaration, occurring on the same day and at the same place, were admissible in order to shew the defendant's knowledge of the nature of the transaction, and to establish co-operation between him and the party who actually gave the money. *Id.*

3. *Thirdly*, that to prove the issuing of the sheriff's precept to a mayor of a borough, to proceed to the election of members of parliament, an examined copy of a document purporting to be the original precept, lodged in the crown office of the Court of Chancery, was the proper evidence. *Id.*

(F.) Trespass.

The plaintiffs having, as overseers and churchwardens, inclosed certain waste lands (under 1 & 2 W. 4, c. 42,) brought trespass against the defendant for prostrating a fence thereon; he pleaded a right of common, which he failed to establish:—*Held*, that the possession of the plaintiffs was sufficient to entitle them to maintain the action, and therefore, that they were not called upon to prove the consent of the lord of the manor to the inclosure, as required by the Statute. *Matson* v. *Cook*, 172.

(G.) Writ of Right.

1. *W. L.* having been appointed receiver of the estates, and certain proceedings in equity having been taken by parties claiming as heir under the above will, in 1783 a decree in *Chancery* was made, terminating the receivership of *W. L.*, and declaring that the premises belonged to him, and that he should be let into possession:—*Held*, in a writ of right brought by a party claiming as heir against the descendants of *W. L.*, that this decree was admissible, not for the purpose of shewing that *W. L.* had any title to the estate, but to shew the termination of his receivership. *Davies* v. *Lowndes*, 450.

2. Upon a general *mise* joined in a writ of right, a fine levied by the tenant's ancestor is admissible in evidence. *Id.*

3. A family pedigree, stated to have been "collected from parish registers, wills, inscriptions, family records, monuments and *history*," is not admissible in evidence. *Id.*

II. To Prove Particular Facts.

(A.) Agency.

In an action for educating a child, who had been placed with the plaintiff by defendant's wife, (who was her aunt,) evidence is admissible to show that the wife was in the habit of ordering domestic articles, which were paid for by the defendant, in order to show her agency. *M'George* v. *Egan*, 462.

(B.) Leave and Licence.

A plea of leave and licence to *erect and maintain* a wall, is not supported by proof of licence to *erect* one. *Alexander* v. *Bonnin*, 337.

(C.) Release.

The defendant pleaded that the plaintiffs and other creditors of *W. C.* (a prior indorser of a bill of exchange,) had entered into a composition with him, whereby they *released* and *discharged* him from all liability upon the said bill; in support of this plea a *Scotch* "assignation" was produced, whereby, after reciting that the plaintiffs had taken certain steps against *W. C.* to recover the amount of the bill (850*l.*) it appeared that in consideration of 116*l.*, the plaintiffs assigned to *D. R. S.* the right of prosecuting such claim:—*Held*, that this did not support the plea, (even supposing it had been amended by striking out the allegation of the composition with the other creditors,) inasmuch as it did not amount to a *release* of *W. C.* from his liability upon the bill. *Houlditch* v. *Cauty*, 162.

III. Secondary Evidence.

If an attorney refuse to produce a deed, as prejudicial to his clients, (assignees, no party to the suit,) *quære*, whether secondary evidence of its contents can be given? *Houlditch* v. *Cauty*, 162.

IV. Witness.

See Way, 4, 5.

Where several co-proprietors of a joint stock company are sued, and some of them, who had the deed of partnership in their possession, suffered judgment by default.—*Held*, that they might be called merely to produce the deed on behalf of those who defended the action. *Colley* v. *Smith*, 92.

EXAMINERS.

See Attorney, 4.

EXECUTION.

See Estoppel.
Foreign Attachment.
Ejectment, III.

EXECUTOR.

The term "letters testamentary," includes as well a copy of *the will* of the testator, as *the certificate* of the ordinary; where, therefore, in an action by an executor who made *profert* of the "letters testamentary" of the deceased in the usual form, and the defendant demanded *oyer* thereof, and the plaintiff delivered a copy of such *certificate* only:—*Held*, that it was not a sufficient compliance with the demand. *Daly* v. *Mahon*, 59.

FACTOR.

See Evidence, I. (A.)

FEME COVERT.

See Married Woman.

FINES AND RECOVERIES.

See Amendment, II.
Evidence, I. G.

The Court made an order, under the Fines and Recoveries Act, for a wife to dispose of lands by deed, without her husband's concurrence, where he had left her a short time after marriage, and had not since been heard of. *Ex parte Elizabeth Sayer*, 373.

FINES (FOR RENEWAL.)

See Covenant, 1.

FOREIGN ATTACHMENT.

To a plea of *foreign attachment* in the *Mayor's Court* in *London*, alleging (*inter alia*), that the defendant (the plaintiff below) *had execution* of the sum attached, the plaintiff (above) replied that he had no notice of the proceedings, and traversed the allegation that the defendant had execution. The record of the Court stated that execution had been had, but in point of fact, there was no execution, and this was proved (together with the whole course of proceeding in the Court) by *A*, one of the attorneys of the Court, and the partner of *W.*, who acted as attorney for the garnishee:—*Held*, *first*, that the allegation in the replication of want of notice was immaterial, as notice was not required by the custom. *Secondly*, that the denial that the defendant had execution, was a good answer to the plea. *Thirdly*, that *A.'s* evidence was admissible, and did not relate to matters of professional confidence. *Fourthly*, that the jury were not precluded from finding that no execution issued, as the defendant, instead of relying upon the record as an estoppel, had taken issue upon that fact. *Magrath* v. *Hardy*, 352.

FOREIGN JUDGMENT.

1. A plea to a count in trover, of a judgment recovered by the plaintiff against the defendant in a foreign court for the same cause of action:—*Held*, bad; especially as it appeared on the record that the defendant was not within the jurisdiction of such court at the time of the commencement of the suit, nor from thence to its termination. *Smith* v. *Nicholls*, 474.

2. The plea stated the judgment recovered in a foreign court "*prout patet per recordum*:" this is not a sufficient averment that such court is a court of record, (per *Bosanquet*, J.) *Id.*

3. A Vice-Admiralty Court abroad, is not a court of record. *Id.*

FORFEITURE.

See LANDLORD AND TENANT, III.

FRAUD.

See BILL OF EXCHANGE, I. IV. 1.
COVENANT, 2.
JUSTICES OF THE PEACE.
PRINCIPAL AND SURETY.

FRAUDS, STATUTE OF.

A broker having, at the request of his principal, purchased some *Spanish* bonds from *H.*, paid him the purchase money:—*Held*, that he might sue his principal for money paid, and that the latter could not set up as a defence that the contract with *H.* was not in writing within the 17th sec. of the Statute of Frauds. *Quære*, whether a contract for *Spanish bonds* is within that section. *Pawle* v. *Gunn*, 200.

FREIGHT.

See EVIDENCE, I. (B.)

GRANT.

See ESTATE TAIL.

GUARANTEE.

See BILL OF EXCHANGE, II.

HOTEL.

See CONTRACT, II. 1.

HUSBAND AND WIFE.

See EVIDENCE, II. (A.)
ASSUMPSIT.
MARRIED WOMAN.

INCLOSURE.

See EVIDENCE, I. (F.)

INFANT.

1. Although a tradesman, before he trusts an infant, ought to make inquiries as to his circumstances, yet the conduct of the infant's parent may be such as to supersede the necessity of such inquiries. Thus, where the mother of the defendant (a young lady under age) had accompanied her in her carriage to the plaintiff's shop where the defendant had purchased goods:—*Held*, that it was not necessary for the plaintiff to make inquiries as to the defendant's circumstances. *Dalton* v. *Gibb*, 463.

2. An issue, whether goods supplied to an infant were necessaries, is a question of fact for the jury. *Brayshaw* v. *Eaton*, 466.

3. It is not *imperative* upon a tradesman to make inquiries as to an infant's circumstances, before he supplies him with goods. *Id.*

INSOLVENT.

See BANKRUPT, 1.
LANDLORD AND TENANT, III.
PRISONER, 5.

1. The surety of a grantor of an annuity is not discharged by the discharge of the latter under the Insolvent Act. *Hocken* v. *Brown*, 173.

2. To a plea of discharge under the Insolvent Act, a replication that the plaintiff had no notice of the defendant's filing a petition, &c., *Held*, ill. *Read* v. *Croft*, 407.

INSPECTION.

See PRACTICE, XIV. C.

INSURANCE.

In an action for running down a vessel, the defendant cannot avail himself of a payment made to the plaintiff by underwriters who had insured the vessel. *Yates* v. *White*, 85.

INTERPLEADER.

See SHERIFF, C.
COSTS, II. 3.

IRREGULARITY.

See PRACTICE, XV.

ISSUES.

See COSTS, IV.

JUDGMENT.

See FOREIGN JUDGMENT.
PRACTICE, XIII.

JUDGMENT FOR WANT OF A PLEA.

See PRACTICE, V.

JUDGMENT AS IN CASE OF A NONSUIT.

See PRACTICE, VIII.

In a country cause, where issue is joined in an issuable Term, but no notice of trial is given, two Assizes must intervene before the defendant is entitled to judgment as in case of a nonsuit. Therefore, where issue was joined in *Trinity Term*, and no notice of trial given, a motion for such judgment in *Hilary Term* following:—*Held*, too early. *Williams* v. *Davis*, 485.

JUDGMENT OF NOLLE PROSEQUI.

See PRACTICE, IX.

JURISDICTION.

See COSTS, II. 1, VI.
FOREIGN JUDGMENT.
PRACTICE, XVII.

JUSTICES OF THE PEACE.

Where overseers are appointed by magistrates in Petty Sessions (being a judicial act), a party who has been distrained upon for poors' rate cannot, in the absence of fraud in such appointment, question its validity (upon the ground of want of deliberation among the magistrates in Sessions) in an action of trespass against the magistrates who signed the distress warrant. The proper mode of questioning the validity of the appointment is by appeal, or by application to *Q. B.* The question of fraud in such a case is for the jury, and the Court will not enquire into the fact whether or not the appointment was the result of deliberation among the magistrates. *Penney* v. *Slade*, 539.

JUSTIFICATION.

See PLEADING, II. (B. *a.*) 2.

LACHES.

See BANKER'S CHECK.

LANDLORD AND TENANT.

See EVIDENCE, I. (D.)
CASE.
PLEADING, II. (B. *b.*) (C. *b.*)

I. LEASE.

(A.) WHAT AMOUNTS TO.

1. A demise may be created by a series of letters; and if the first of such series be properly stamped as a lease, it will be sufficient. *Chapman* v. *Bluck*, 27.

2. The plaintiff in *April*, sold by auction the herbage of certain closes in lots, subject to certain printed conditions of sale, by which the highest bidder was to be entitled to *possession* till the following *September*; he was to pay down a deposit, and give security for the residue, and on failure of his so doing, the deposit was to be forfeited. The defendant became the purchaser of lot 2 for 45*l.*, and signed the *conditions of sale*:—*Semble*, that this document constituted a lease; and *held*, that if so, it was a "lease granted in consideration of a premium," within the meaning of the Stamp Act (Schedule, Tit. *Lease*), and therefore, the sum paid being under 50*l.*, that a 1*l.* stamp was sufficient. *Cattel* v. *Gamble*, 405.

(B.) LEASE OR AGREEMENT.

1. In a question whether an instrument shall be considered as a lease, or only as an agreement for a lease, it is *established*, that the intention of the parties is the proper test of construction; and such intention may be gathered not only from the terms of the instrument itself, but also from the concurrent or subsequent acts of the parties. *Chapman* v. *Bluck*, 27.

2. *A.* by letter proposed to take certain premises of *B.* at a certain rent, and for a certain term, possession to be given upon the payment of a sum to be ascertained by valuation, and he referred to a third party as to his responsibility. *B.*, having accepted such terms, and expressed his satisfaction as to the result of the reference; by a subsequent agreement between the parties, *A.*, upon payment of a different sum from that originally proposed, was let into possession. The rent not having been paid, *B.* distrained; whereupon, *A.* sued in replevin; a subsequent distress by *B.* was expressly acquiesced in by *A.*:—*Held*, that all these circumstances established that *A.* held under *B.* as tenant: and *semble*, that such tenancy was sufficiently established by the original proposal of *A.* when accepted by *B.* *Id.*

(C.) Construction of.

1. Where a lease contained a proviso that upon breach of any of the covenants therein, on the part of the lessee, &c., the lessor might re-enter on the premises, "and the same have again, as if the said lease had never been made:"—*Held*, the proper construction of this proviso was, that the lease was to be void from and after the re-entry by the lessor, and not, as was contended, that the lease was thereby rendered void *ab initio*. *Hartshorne* v. *Watson*, 15.

2. Therefore, where the lessor having entered for breach of covenant for payment of rent:—*Held*, he could maintain *covenant* against the assignee for the arrears of such rent. *Id.*

3. *A.*, by indenture, "*demised*" certain premises to *B.*, and covenanted for *B.'s* quiet enjoyment against himself and all claiming under him:—*Held*, that the *implied* covenant of title raised by the word "demise," was restrained by the subsequent express covenant for quiet enjoyment, and that the plaintiff could not sue upon the former. *Line* v. *Stevenson*, 294.

4. By an agreement, *A.*, the owner of certain land, covenanted with the defendant that, when any of the houses thereinafter covenanted to be built by the defendant according to a plan, should be finished, *A.* would demise them to the defendant or his nominees; reserving to *A.* a right of way over certain streets marked in the plan; to hold *the said piece or parcel of ground for* eighty years: the defendant entered, paid rent, and built the houses:—*Held*, that by this instrument, there was only a covenant to demise as to the part to be built upon, but that there was an actual demise as to the streets; and therefore, that *A.* could not maintain trespass against the defendant for building a wall across the end of one of such streets. *Alexander* v. *Bonnin*, 337.

5. A plea, stating a covenant to demise *the whole of the land*, is not supported by such an agreement. *Id.*

(D.) What Passes Under.

If a house, and the land on which it stands, are demised, without any reservation of mines, any coal that may be under such house is, during the tenancy, in the *possession of the tenant:* therefore, where *A.* let a house, and the land on which it stood, to *B.*; and *C.*, whose land lay contiguous, undermined the house, and carried away coal that was found beneath it, whereby the house sank:—*Held*, that *A.* might maintain *case* against *C.* for the injury to his reversion. *Raine* v. *Alderson*, 329.

II. Determination of Tenancy.

1. If a tenant of part of a dwelling-house holds over after the determination of the term, and the landlord distrains upon the tenant, and afterwards on the same day forcibly ejects him; *Quære*, whether, in an action by the tenant for the assault, the landlord can justify in defence of his possession. *Newton* v. *Harland*, 152.

2. The absence of proof, of either payment or demand of rent for sixteen or seventeen years, is evidence, though slight, of the determination of a tenancy from year to year. *Stagg* v. *Wyatt*, 327.

III. Forfeiture.

Where there was a provision in a lease, that in case of the bankruptcy or *insolvency* of the tenant, the lease should be forfeited and the landlord might re-enter; and the tenant took the benefit of the Insolvent Act, (being at that time indebted to his landlord for goods,) but the landlord subsequently received rent from him:—*Held*, that this was a waiver of the forfeiture. *Doe*, d. *Gatehouse* v. *Rees*, 159.

LEASE.

See Landlord and tenant.
Covenant, 1.
Way, 1, 2.

LEAVE AND LICENCE.

See Evidence, II. (B.)

LETTERS.

See Landlord and Tenant, 1. (A.)

LETTERS TESTAMENTARY.

See EXECUTOR.

LIBEL.

See PLEADING, II. (B. *a.*) 2.

An article published in a magazine, imputing that the plaintiff, who was secretary to a railroad company, had brought the company into disrepute by certain letters written by him, and by other acts, is a libel upon the plaintiff. *Robertson* v. *Wilde*, 157.

LIBERTY.

See ESTOPPEL.

LICENCE.

See CONTRACT, II. 1.
EVIDENCE, II. (B.)

LIEN.

See PAWNBROKER.

1. Where *A.* pledges a chattel with *B.*, and pursuant to an agreement made between them at the time, *A.* has the possession of it for a limited period, for the use of *B.*; and at the end of such period it is returned to its ordinary place of custody, *B.* does not forfeit his lien; the possession of *A.* being, in such case, the possession of *B.* *Reeves* v. *Capper*, 427.

2. Where a chattel is pledged under a written agreement, not under seal, although such agreement is immaterial as to the question of property, it may prove the object of the pledge, and the nature of the interest intended to be passed. *Id.*

3. *W.*, the master of a ship, pledged his chronometer with the defendants, the owners of the ship, under a written agreement, stating the pledge to be made in consideration of an advance of money, upon the condition that *W.* should have the use of it during an intended voyage. The chronometer was taken by *W.* from the custody of the maker, where it was at the time of the pledge, and handed over to the defendants' agent, by whom it was re-delivered to *W.*, who took it with him upon the voyage. On his return he again deposited it with the maker, and afterwards pledged it to the plaintiff, an attorney, in consideration of his withdrawing an execution against him; and the maker, in ignorance of the pledge to the defendants, agreed to hold it for the plaintiff:—*Held*, that the property remained in the defendants. *Id.*

LIMITATIONS, STATUTE OF.

See COSTS, VII. 2.
PRACTICE, IV. D.

LONDON.

See FOREIGN ATTACHMENT.
PLEADING, II. (A. *b.*) 2.

LORD OF A LIBERTY.

See ESTOPPEL.

LORD OF A MANOR.

See EVIDENCE, I. (F.)

MAGISTRATES.

See JUSTICES OF THE PEACE.

MALICIOUS ARREST.

See EVIDENCE, I. (C.)

MANDATE.

See ESTOPPEL.

MANOR.

See EVIDENCE, I. (E.)

MARRIED WOMAN.

1. An affidavit (verifying the certificate, that a married woman, resident abroad, had acknowledged a deed pursuant to 3 & 4 W. 4, c. 74, s. 85,) sworn before a *British Consul* is not sufficient; it should be sworn before either the local Courts, or some person authorized by the law of the land to administer oaths. *In re Eady*, 156.

2. The Court allowed the certificate of a married woman's acknowledgment of a deed in foreign parts to be filed, the affidavit verifying the certificate not being signed, upon the

production of an affidavit that such was the practice there. *Ex parte Birch*, 172.

3. The Court of *C. P.* has authority, under s. 91 of 3 & 4 W. 4, c. 74, to authorize a married woman to dispose of her *copyhold* property without the concurrence of her husband, residing abroad, notwithstanding the provision in s. 77. *Ex parte Ann Shirley*, 484.

4. One of the commissioners to take the acknowledgment of a married woman, resident at *Illinois*, in *America*, was described as "Judge *M'R.*" In his affidavit he signed himself "*S. M'R.*, barrister;" and the affidavit was taken before a notary public:—*Held*, sufficient, upon an affidavit that judges frequently practised at the bar there, and that notaries public were authorized to take affidavits. *Ex parte Mary Ann Mann*, 502.

MEMORANDA.

Page 556.

MINES.

See LANDLORD AND TENANT, I. (D.)

MISDIRECTION.

A statement by a judge to the jury, that in his opinion a usage has been proved, is not a misdirection. *Bottomley* v. *Forbes*, 431.

MISREPRESENTATION.

See PLEADING, II. (B. *a.*) 3.

MORTGAGE.

See BILL OF EXCHANGE, I.
VOLUNTARY CONVEYANCE.
POWER.

NECESSARIES

See INFANT, 2.

NEW TRIAL.

Where a cause was taken as undefended, owing to the defendant's attorney having omitted to deliver briefs to counsel, the defendant being present at the trial, and the verdict being for 7*l.*, the Court refused a new trial on any terms. *Watson* v. *Reeve*, 388.

NOTICE.

GENERALLY.

See CONTRACT, II. 1.
FOREIGN ATTACHMENT.
PLEADING, II. (B. *a.*) 3.

NOTICE OF ACTION.

See ACT OF PARLIAMENT.

NOTICE OF DISHONOUR.

See BILL OF EXCHANGE, III.

NUISANCE.

User of a nuisance for less than twenty years, will not legalize it; therefore, to an action on the case for a nuisance, arising from a candle factory, it is no defence that the defendant had carried on the trade for three years before the plaintiff became possessed of his premises. *Bliss* v. *Hale*, 19.

OFFICER.

See EAST INDIA COMPANY.
ESTOPPEL.

OVERSEERS.

See EVIDENCE, I. (F.)
JUSTICES OF THE PEACE.
POOR.

OYER.

See EXECUTOR.

PARLIAMENT.

See EVIDENCE, I. (E.)
SHERIFF, C.
SPEAKER'S CERTIFICATE.

PARTICULARS OF DEMAND, ETC.

See PRACTICE, IV.

PARTICULARS OF SALE.

See CONTRACT, II. 1.

PARTIES.

See ACTION, 1, 3.

PARTNERS.

See ACTION.
EVIDENCE, IV.

PATENT.

See PRACTICE, IV. B.

PAWNBROKER.

A lien cannot arise out of an illegal contract. Where a Statute enjoins certain things to be done as preliminaries or accompaniments of a certain contract, and they are not complied with, such a contract is illegal and void, although a penalty may be imposed by the Act for the non-compliance with its injunctions. By the 6th section of the Statute 39 & 40 G. 3, c. 99, every pawnbroker advancing money upon goods pawned, shall, "before he advance any money upon such pawn," make entries in his books of certain facts "into which he is required to enquire before any money shall be lent;" by the 26th section, a penalty is imposed for every neglect to make such entries:—*Held*, that such enquiries and entries are a condition precedent to the validity of a contract upon a pledge of goods with a pawnbroker, and, therefore, that in the case of non-compliance with the requisitions of this Act, a pawnbroker could not set up a lien upon goods pawned with him. *Fergusson* v. *Norman*, 418.

PAYMENT.

See PRACTICE, IV. C.

PAYMENT OF MONEY INTO COURT.

See COSTS, II. 2. 3.

PEDIGREE.

See EVIDENCE, I. (G.)

PENALTY

See PAWNBROKER

PENSION.

See EAST INDIA COMPANY.

PERSON.

See ACT OF PARLIAMENT.

PLEADING.

See ACTION.
AMENDMENT, III.
CHARTER-PARTY.
EXECUTOR.
FOREIGN ATTACHMENT.
FOREIGN JUDGMENT.
INSOLVENT, 2.
LANDLORD AND TENANT, I. (G.) 5.
PRACTICE, V. VII.
SHERIFF.
TROVER.

I. GENERALLY.

(A.) PLEA.

(*a.*) COMMENCEMENT AND ENDING.

Where a plea is expressly pleaded to *part* only of the cause of action, it ought to commence with the allegation of *actionem non*, and end with a prayer of judgment. *Upward* v. *Knight*, 546.

(*b.*) PLEA PUIS DARREIN CONTINUANCE.

In *covenant* for breaches in an agreement for a lease, where, from the plaintiff's delay in proceeding, the defendants had reason to conclude he had abandoned the action, the Court allowed one of the defendants to plead his bankruptcy and certificate, *puis darrein continuance*, without an affidavit that the matter of the plea arose within eight days previously, as required by R., H. 4 W. 4, (Pleading Rules) I. 2. *Kibblewhite* v. *Reynolds*, 510.

(*c.*) PLEADING SEVERAL MATTERS.

1. Where a defence consists of facts which may lead to different legal conclusions, a defendant will be allowed to plead several pleas, stating different views of these facts. *Currie* v. *Almond*, 483.

2. To an action for false imprisonment, defendant was allowed to plead (1) that he had discounted a bill, which was forged by plaintiff; (2) that it was forged by some person unknown, and knowingly uttered by plaintiff; (3) that defendant had reasonable cause to believe plaintiff had forged it; and (4) that plaintiff had obtained money from defendant on false pretences. *Id.*

3. Upon a motion to plead several matters, the Court will not decide whether a proposed plea is bad. *Id.*

(B.) PARTICULAR PLEAS.

A plea of set-off, stating that "before the commencement of the action" the plaintiff was indebted to the defendant upon an account stated, contains a sufficient allegation of the time when such account was stated. *Upward* v. *Knight*, 546.

II. In Particular Actions.

(A.) Assumpsit.

(*a.*) Declaration.

A declaration contained two counts; the first, upon a bill of lading to carry goods from *D.* to the port of *L.*, and there deliver them to plaintiff; the second, upon a contract in consideration of further reward, to carry the same goods from a wharf at the port of *L.*, and to deliver them at the plaintiff's premises:—*Held*, no violation of R., H. 4 W. 4, (Pleading Rules, No. 5.) *James* v. *Bourne*, 182.

(*b.*) Plea.

1. In *assumpsit*, for money received, a defence that the transaction arose out of a wager, which was illegal under the Gaming Acts, is a matter in confession and avoidance, as relying upon "illegality of consideration by Statute," and must be specially pleaded since R., H. 4 W. 4, I. *Assumpsit*, 1, 3. Therefore, where *O.* and *T.* had made a wager for 1,000*l.* upon a horse-race, which was illegal, under the Statute 9 An. c. 14, and the defendant took a share of 50*l.* on *O.*'s side, and the plaintiff took a share of 20*l.* in that sum from the defendant; and *O.*, having won, paid the 50*l.* to the defendant, who refused to pay over the 20*l.* to the plaintiff, and the latter brought an action for money received for the 20*l.*, in which the defendant pleaded only the general issue:—*Held*, that he could not insist upon the illegality of the transaction. *Martin* v. *Smith*, 194.

2. In *assumpsit*, the first count was upon a special contract to carry goods in a steam-vessel from *Dublin* to *London*, and to deliver them at the port of *London* to the plaintiff; *breach*, that by the defendant's negligence the goods were lost. *Pleas*; *first*, that after the arrival of the steam-vessel in *London*, the defendants landed the goods at a certain wharf, (being a usual place for such purpose,) where they were destroyed by an accidental fire. *Second*, that after the arrival of the steam-vessel, the defendants were ready to deliver to the plaintiff, but that he was not ready to receive, concluding with an allegation of the landing on the wharf and loss by fire, as in the former plea:—*Held*, bad in substance, as containing no excuse for the non-delivery; no special custom of the port of *London* being alleged that such landing amounted to a delivery. *Gatty* v. *Bourne*, 120.

3. The second count was upon a contract to carry goods from *D.* to *L.*, and to take care of them at a wharf there, and deliver them to the plaintiff. *Plea*, that the defendants did take care of them, at the wharf, till they were destroyed by fire: *held* bad, as the defendants were charged as common carriers. The plaintiff having demurred to the defendant's pleas, the latter omitted to give notice of the points intended to be insisted upon by him, as required by R., T. 11 G. 4. The Court confined him to answering the argument of the plaintiff. *Id.*

4. To a declaration on a bill of exchange against the acceptor, the defendant pleaded that it was accepted under duress, and averred that he never had any value for the acceptance:—*Held*, such plea was *double*. *Stevens* v. *Underwood*, 254.

5. To a declaration on a bill of exchange, a plea that the bill was not *duly* stamped, *held* ill. *Haward* v. *Smith*, 257.

6. There is no difference between a plea, that defendant did not indorse a bill (generally), and one that he did not indorse it to *A. B.* (the indorsee.) *Waters* v. *The Earl of Thanet*, 509.

(B.) Case.

(*a.*) Declaration.

1. In an action for illegally obtaining a chattel under duress of imprisonment, the plaintiff need not aver that the former suit was instituted without probable cause, or that such suit was terminated. *Grainger* v. *Hill*, 42

2. *Declaration* for a libel, in stating of plaintiff's ship that she was leaky, and had been sold to the Jews to carry out convicts. *Plea*, to the whole declaration, justifying that the ship was leaky only, *held* ill. *Ingram* v. *Lawson*, 387.

3. In *case* for misrepresentation as to the value of a public-house, the *declaration* stated that the defendant made the false representation to *B.*, upon a treaty for the sale of the lease between them; that this treaty went off; that it was afterwards agreed between plaintiff, defendant and *B.*, that the former should become the purchaser in the room of the latter; that *B.* at that time communicated defendant's representation to plaintiff, *whereof defendant had notice*; and that plaintiff afterwards, confiding in such representation, agreed to become the purchaser. *Plea*, that defendant did not authorize *B.* to communicate the representation to plaintiff:—*Held*, *first*, that the declaration disclosed a sufficient cause of action; and, *secondly*, that the plea was no answer. *Pilmore* v. *Hood*, 390.

(*b.*) Plea.

Supra, (*a.*) 3.

To a declaration, alleging that it was the defendant's duty, as tenant of a farm, to manage such farm in a husbandlike manner, *and* according to the custom of the country, and stating, that he had, in a bad and untenantable manner, *and* contrary to the custom of the country, taken hay off the land without bringing back manure.—A plea, traversing the custom, is good. *Hartley* v. *Burkett*, 258.

(C.) Covenant.

(a.) Declaration.

Semble, that a declaration alleging an eviction as a breach of covenant for quiet enjoyment, ought to state *positively* that the title of the evictor was not derived from the plaintiff himself. *Brookes* v. *Humphreys*, 379.

(b.) Plea.

In *covenant* for rent in arrear, where the defendant in his plea stated that the lease contained a proviso, that upon breach of any of the covenants by the lessee the lessor might re-enter on the premises, and the same have again as if the lease had never been made, and then alleged a breach of covenant by non-payment of six quarters' rent, and a re-entry by the plaintiff in respect thereof: the plaintiff is entitled to treat this plea as divisible, and to reply to part of it, and demur to the residue. *Hartshorne* v. *Watson*, 15.

(D.) Replevin.

1. In order to constitute common *per cause de vicinage* the adjoining lands must both be commonable. *Heath* v. *Elliott*, 170.

2. In replevin for taking cattle from an open common, called *Houghton Down*, the defendant avowed that the *locus in quo* was his leasehold property, and that cattle had been taken there *damage feasant*; the plaintiff pleaded, that the *locus in quo* adjoined another common, called *Bury Hill Down*, and that a right of common *per cause de vicinage* existed between the adjoining downs, upon which issue was taken:—*Held*, that this issue involved the question, whether both the downs were commonable. *Id.*

(E.) TRESPASS.

Supra, I. (A. *c.*) 2.

In trespass *quare clausum fregit*, a plea that the plaintiff had sustained no damage beyond that which affected his personal estate, and that, after the trespasses, he took the benefit of the Insolvent Act, whereby the cause of action had vested in the provisional assignee:—*Held*, not an issuable plea. *Wetenhall* v. *Graham*, 286.

(F.) Trover.

1. A plea in trover, that one *J. R.* was lawfully possessed of the goods in question, and pledged them to one *T. F.* upon the discount of a bill of exchange; that *T. F.* deposited them with the defendant (a warehouseman); that the bill was dishonoured, and the defendant detained the goods at *T. F.'s* command:—*Held*, bad. *Jaulerry* v. *Britten*, 58.

2. In trover by the assignee of a bankrupt, a plea that the plaintiff is not assignee, puts in issue the validity of the bankruptcy. *Butler* v. *Hobson*, 93.

PLEDGE.

See Lien.
Pawnbroker.
Pleading, II. (F.) 1.

POOR.

See Evidence, I. (F.)
Justices of the Peace.

1. By the Poor Law Amendment Act, 4 & 5 W. 4, c. 76, sec. 23, the Poor Law Commissioners are authorized to order the overseers of any parish, having a *workhouse*, to enlarge the same; by sec. 109 (the interpretation clause), the word *workhouse* is to include "any house in which the poor of any parish shall be lodged and maintained, or any house or building purchased, erected, hired or used at the expence of the poor-rate, by any parish, &c., for the reception, employment, classification or relief of any poor person therein, at the expence of such parish:" and the word *poor* is to include "any pauper, or poor or indigent person applying for, or receiving relief from the poor-rate, or chargeable thereto." *Cantrell* v. *The Guardians of the Poor of the Windsor Union*, 133.

2. In 1797, six cottages were erected, and certain land was purchased by the parish of *W.*, partly from a fund arising from charitable bequests, and partly from a fund raised under the Inclosure Act, 29 G. 2, c. 36, which, in pursuance of sec. 2, was placed in the hands of the parish officers for the relief of the poor; the cottages were repaired out of the poor-rate. Two of the cottages were occupied, immediately after their erection, as a school-house, and afterwards as a poor-house; the other four were always let at a low rent to independent labourers, who paid no poor-rates, but some of whom received occasional relief; and on two occasions parish paupers had been lodged in these cottages, but the parish paid the tenants for their lodging. The land was allotted into various small allotments, four of which were appropriated to the four cottages in question; the remainder being let out to independent labourers. *Held*, that neither the four cottages nor the land came within the definition of "workhouses," given in the 109th sec. of the Poor Law Amendment Act. *Id.*

POSSESSION.

See Evidence, I. (E.)

POSTEA.

See Costs, IV. 1, 2.

POWER.

P. S. devised an estate to his executors, to the use of *J. S.* for life, with a power to them to mortgage, and a proviso that the person entitled to the rents and profits might lease for twenty-one years. In 1812, after the testator's death, *J. S.* (the tenant for life,) demised to *T. C.* for ninety-nine years, if he (*J. S.*) should so long live; in 1814, he demised (under the power) to the defendant for twenty-one years; and in 1828, the surviving executor mortgaged to the plaintiff (also under the power) for 1000 years:—*Held*, *first*, that the leasing power of the tenant for life was not destroyed by the lease of 1812; *secondly*, that such power was not suspended, as against the mortgagee, under the mortgage of 1828; and, *thirdly*, that in an action by such mortgagee, as reversioner, against the lessee, under the demise of 1814, for breach of farming covenants, the defendant could not set up the interest of *T. C.* under the demise of 1812. *Bringloe* v. *Goodson*, 322.

PRACTICE.

See Affidavit.
Amendment.
Arbitration, 2.
Arrest, 1.
Attorney.
Bail.
Bill of Exchange, IV.
Costs.
Court of Requests.
Ejectment, I. III.
Married Woman, 1, 2, 4.
New Trial.
Pleading, I. (A. *c.*) 3.
Sequestration.
Sheriff.

I. Process.

A. Form of Writ.

B. Writ of Summons.

a. Generally.
b. Defendant's Residence.
c. Attorney's Description.
d. Service of.

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II. Appearance.

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D. Amending.

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VII. Striking out Pleas.

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IX. Judgment of Nolle Prosequi.

X. Venire.

XI. Writ of Trial.

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A. Signing.

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XIV. Incidental Proceedings.

A. Commission to Examine Witnesses.

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C. Inspection.

a. Of Documents.
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D. Rules.

E. Staying Proceedings.

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XV. Irregularity.

A. Waiver.

XVI. Special Case.

A. Right to Begin.

B. Judgment.

XVII. Jurisdiction of Judges at Chambers.

I. Process.

A. Form of Writ.

An action having been commenced by *capias*, the Court refused to give directions that it might be continued by *summons*. *Fitzjames* v. *Lush*, 385.

B. Writ of Summons.

a. Generally.

Query, whether a *pluries* writ of summons can be issued before the *alias* is returned? An *alias* or *pluries* may issue and bear *teste* within a reasonable time after the writ of summons has expired. *Norman* v. *Winter*, 511.

b. Defendant's Residence.

1. By Stat. 2 & 3 W. 4, c. 64, (the Parliamentary Boundary Act,) the town of *Newcastle-upon-Tyne* comprises the town and county of the town, and certain townships in the county of *Northumberland*:—*Held*, that a writ of summons describing the defendant as "of *Newcastle-upon-Tyne*, in the county of *Northumberland*," was not on the face of it irregular. *Rippon* v. *Dawson*, 470.

2. It is sufficient to describe a defendant, in a writ of summons, as of his last known place of abode, though four years may have elapsed since he ceased to reside there. *Norman* v. *Winter*, 511.

3. Defendant having given a wrong address, a third party informed plaintiff he might be found in *Broad-street*, *London*; and he was described as of that place in the writ of summons:—*Held*, sufficient, though there was no street of exactly that name, and the defendant swore he had never resided in a street of a similar name. *Lancaster Railway Company* v. *Brennan*, 537.

c. Attorney's Description.

The plaintiff, an attorney, endorsed the writ with the name of the firm of which he was a member:—*Held*, a sufficient compliance with 2 W. 4, c. 39, s. 12. *Dawes* v. *Salomonson*, 270.

d. Service of.

Where the copy of a writ of summons was given to the wife of a defendant, who stated she had given it to her husband, the Court would not allow the plaintiff to enter an appearance for him, as he could not swear to a personal service. *Gibson* v. *Wilson*, 371.

C. Distringas.

1. Where a defendant's residence for the last five years was unknown, and applications had been made to her attorney and other parties to ascertain her present residence without success, the Court granted a *distringas*. *Norman* v. *Winter*, 131.

2. An affidavit to obtain a *distringas* must state that the deponent believes the defendant is purposely keeping out of the way. *Outhwaite* v. *Carr*, 243.

3. The affidavit for a *distringas* to compel an appearance should state an application at the defendant's last place of residence. *Norman* v. *Winter*, 256.

4. *Distringas* to compel an appearance granted where the defendant's residence was unknown, upon its appearing he had received the writ. *Moody* v. *Morgan*, 388.

5. *Distringas* granted where, after previous calls, there had been two on the same day, the second by appointment. *Flight* v. *Harbart*, 389.

6. *Distringas* refused where all the three calls were on the same day. *Fenton* v. *Hill*, 390.

7. An *alias pluries* was issued after a *distringas* for outlawry, which was not acted upon:—*Held*, valid, and the *distringas* was set aside. *Norman* v. *Winter*, 511.

8. A *distringas* for outlawry issued 7th *June*, returnable 2d *November*. On 25th *October*, (there not then being fifteen days before the return day,) the plaintiff, without a judge's authority, issued another *distringas*, *tested* 7th *June*: the Court refused to amend the *teste*, and set aside the *distringas*. *Id.*

9. *Query*, whether the last *distringas* was not a mere nullity? *Id.*

II. Appearance.

Where the defendant resided abroad, and the plaintiff proceeded against him, in a non-bailable action by a *distringas* to compel an appearance, and signed judgment by default, the Court let him in to plead upon his entering a common appearance, without imposing any other conditions upon him. A judgment under such circumstances, is not however irregular. *Esdaile* v. *Marshall*, 9.

III. Venue.

A. Changing.

1. Where a plaintiff was called to the bar after the commencement of the suit, the Court

refused to change the venue to *Middlesex* at his request. *Newton* v. *Harland*, 155.

2. It is no ground for changing the *venue* in a special jury cause, that there are but twenty-nine special jurymen in the county. *Doe*, dem. *Lloyd* v. *Williams*, 469.

3. After notice of trial, the Court will not change the venue, at the instance of the defendant, on a general affidavit, stating that sixty witnesses will be required for the defence, and that the costs will amount to 2,000*l.* by trying the cause where the venue is laid. *Thornhill* v. *Oastler*, 533.

B. Bringing Back.

1. In a horse cause, proof that a letter was written in the county of *Middlesex*, giving notice to the defendant of the horse's unsoundness, and was afterwards seen in the same county in the possession of his attorney, was held sufficient to satify the usual undertaking upon which the plaintiff had brought back the venue to that county. *Collins* v. *Jenkins*, 51.

2. In an action for slander, the *venue* was laid in *L.*, the defendant had changed it to the county of *K.* on the usual affidavit; but the Court, upon affidavits, shewing that the subject matter of the alleged slander had been commented on in a newspaper which circulated in *K.*, accompanied with animadversions on the plaintiff, ordered the *venue* to be brought back, upon terms. *Pybus* v. *Scudamore*, 464.

IV. Particulars.

A. Of Demand.

The defendant having become a bankrupt, the Court set aside an order that the plaintiffs should deliver particulars of their demand within a certain period, upon payment of costs by them. *Reece* v. *May*, 398.

B. Of Objections.

In an action for infringing a patent, the defendant's particular of objections must be distinct and definite. *Fisher* v. *Dewick*, 282.

C. Of Plea.

The defendant having pleaded *payment*, the Court, upon the application of the plaintiff, who swore that without the particulars of such payment he could not safely proceed to trial, made an order that the defendant should deliver such particulars. *Ireland* v. *Thompson*, 271.

D. Amending Particulars.

The defendant, having acted as agent for the plaintiffs, left their employment in 1827, and gave up his accounts, in which he debited himself to the amount of 3,000*l.*, for monies received for them. In the same year they commenced an action against him for that sum, and delivered particulars of demand, framed upon the accounts he had given in; but no further steps were taken till the early part of 1837, when they demanded a plea; they subsequently discovered that the defendant had received various other sums for which he had not accounted:—*Held*, that the plaintiffs were entitled to amend their particulars by the insertion of these sums, the defendant having liberty to plead the Statute of Limitations to the new items of demand. *Staples* v. *Holdsworth*, 275.

E. Setting Aside.

The parties to a cause agreed that the matter in dispute should be limited to one particular question; the defendant, contrary to good faith, pleaded a set-off, and delivered particulars, embracing another subject of dispute between the parties: the Court, upon the plaintiff's paying the amount claimed in such particulars, set them aside. *Gould* v. *Oliver*, 292.

V. Judgment for Want of a Plea.

See post, XIII. A.

1. The Court will not give the plaintiff leave to sign judgment as for want of a plea, merely on the ground that a plea is no answer in law to the action; nor where a plea is a discontinuance: but in such cases he must act upon his own responsibility. *Charter* v. *Waldgrave*, 240.

2. If a plea professes to answer the whole declaration, and in truth only answers part, the plaintiff cannot sign judgment for the part unanswered, but can only demur. *Wood* v. *Farr*, 492.

3. Therefore, where, to a declaration in debt for 150*l.* containing three counts of 50*l.* each, the defendant pleaded, as to the whole action, payment of 50*l.*, and the plaintiff, in his replication, signed judgment for 100*l.*:—*Held*, the judgment was irregular. *Id.*

VI. Rule to Compute.

A. Generally.

1. On judgment by default in an action of *covenant* to recover the instalments due under a deed of separation, the Court granted a rule to compute. *Barry* v. *Rainsford*, 93.

2. The Court refused to grant, as part of a rule to compute, that the bill (which was alleged to be lost), need not be produced before the Master. *Sanderson* v. *Lee*, 372.

B. Service of.

See Grant v. *Stoneham*, 389.

1. Where the defendant, an attorney, had

left his registered place of abode, and the plaintiff stuck up one copy of a rule *nisi* to compute on the door of the house, and another in the Master's office, the Court made the rule absolute. *Davis* v. *Nugee*, 269.

2. Service of rule to compute dispensed with, where defendant resided abroad and had no place of residence here. *Gibson* v. *Lord Ranelagh*, 517.

VII. Striking out Pleas

See post, XIII. B.

A rule to plead several matters, according to an abstract delivered, having been obtained by consent, one of which, according to such abstract, was that the plaintiff was "an alien;" the defendant delivered a plea to the effect that the plaintiff was "an alien born:" the Court refused to strike out such plea. *Pisani* v. *Lawson*, 107.

VIII. Judgment as in case of a Nonsuit.

1. Where a plaintiff had given a peremptory undertaking to try at the Sittings after *Easter Term*, but during that Term, under counsel's advice, made it a special jury cause, whereby it became a *remanet*, the Court, in *Trinity Term*, discharged a rule for judgment as in case of a nonsuit, upon the plaintiff's giving a peremptory undertaking to try at the Sittings after that Term. *Twysden* v. *Stultz*, 256.

2. Where issue was joined in *Easter Term*, and notice of trial given for the second Sittings in *Trinity Term*, which was countermanded: —*Held*, it was too soon to apply in the latter Term for judgment as in case of a nonsuit. *Phillips* v. *Eardley*, 275.

3. Where a defendant has objected to receive a notice of trial, as being insufficient, he cannot afterwards rely upon it to entitle him to judgment as in case of a nonsuit. *Clarke* v. *Golding*, 427.

IX. Judgment of Nolle Prosequi.

To an action for goods sold, defendant pleaded the general issue, and a discharge under the Insolvent Act. The plaintiff delivered a *similiter* to the first plea, and a *nolle prosequi* to the second. The defendant signed judgment of *nolle prosequi* to the whole action: —*Held*, regular. *Peters* v. *Croft*, 397.

X. Venire.

In *debt* on bond, the plaintiff having assigned a breach in his replication:—*Held*, that a *general venire* was proper, under 8 & 9 W. 3, c. 11, s. 8. *Scott* v. *Staley*, 274.

XI. Writ of Trial.

A writ of trial should correspond with the issue, and if it do not, it is an irregularity. Therefore, where the date of the writ of summons had been omitted in the issue, and was inserted by the attorney in the writ of trial:—*Held*, that this was a variance, and the writ of trial was set aside with costs. *Blissett* v. *Tenant*, 6.

XII. Verdict.

1. The judge having left the Court after the jury had retired, upon their return they tendered to the associate a verdict in writing for the plaintiff, containing their reasons; the associate refused to receive it, and entered the verdict generally for the plaintiff:—*Held*, he was justified in so doing. *Whiffle* v. *Bradford*, 120.

2. The first count of a declaration in *assumpsit* stated a contract that the plaintiff should act as an accountant to the defendants, at a salary of 400*l.* *per annum*, ending on the 1st of *September* each year; and alleging, as a breach, the plaintiff's dismissal during a current year. The second count was an *indebitatus* count, for work and labour. The defendants pleaded *(inter alia)* first, to the whole declaration, the general issue; thirdly, to the first count, that they were induced to enter into the contract by fraud; sixthly, to the same, that the plaintiff had received monies without accounting for them, had made false entries in the books, and had disobeyed the reasonable commands of the defendants, whereupon they discharged him; and, to the second count, payment. At the trial, it appeared that a company was formed in *September*, 1834; when the plaintiff was appointed accountant, at 400*l.* a year; that, in the summer of 1835, the defendants became shareholders; that in the following *December*, the concern being in a very bad state, the plaintiff concocted a fraudulent report, and made false entries in the books as to the profits: that the fraud was afterwards discovered, and a committee was appointed to investigate the matter; that, in *December*, 1836, the plaintiff, who had already received 180*l.*, sent in a claim for 750*l.*; whereupon the committee wrote to him that he must abandon his claim, before they could consider what remuneration he was entitled to; the plaintiff did not answer this letter, or one or two others which the committee wrote to him, and they complained of his disrespect; he refused, however, to abandon his claim; and on the 3d of *January*, 1837, the committee dismissed him:—*Held*, *first*, that the plaintiff was entitled to the verdict on the third plea, as there was no evidence of any fraud in the inception of the contract:—*secondly*, that the defendants were entitled to the verdict on the sixth plea, as it was sufficient to prove any one

of the allegations of misconduct, in order to support that plea; and it was a question for the jury, whether the plaintiff had been discharged on the ground of the misconduct proved at the trial, or for the disrespect of which the committee had complained, and they were justified in finding the former. *Thirdly*, that, under the general issue, it was competent to the defendants to show that the services for which the plaintiff claimed remuneration under the common count, were worthless. *Baillie* v. *Kell*, 245.

XIII. Judgment.

A. Signing.

1. The time for pleading having expired, the clerk of the plaintiff's attorney was sent to sign judgment; after his departure, the defendant's attorney tendered a plea at the office of the plaintiff's attorney, who said he would accept it if judgment were not signed; defendant's attorney hastened to the judgment office, and arrived there just as judgment was signed: —*Held*, the judgment was regular. *Stafford* v. *Nichols*, 262.

2. Judgment was signed in *M. T.*, 1833. The plaintiff's attorney, in his bill of costs, had charged for entering the issue and judgment upon the roll, but, in fact, had done neither. The defendant wishing to enter up satisfaction on the roll, the Court, in *E. T.*, 1838, ordered the plaintiff's attorney to complete the issue, and carry in the roll, but without costs. *Oram* v. *Parker*, 208.

B. Setting Aside.

To a declaration in trespass, the plaintiff pleaded two pleas; upon the first, issue was joined; to the second, the plaintiff replied and the defendant rejoined; the plaintiff demurred to the rejoinder: the defendant, instead of joining issue on the demurrer, gave notice he should take no further steps on the second plea; the plaintiff signed judgment by *nil dicit* on the whole record. The Court set aside the judgment as irregular, and ordered the second plea, and all subsequent pleadings, to be struck out. *Hitchcock* v. *Walford*, 139.

C. Reversing.

The rule to reverse a judgment, where the requisitions of R. xiii., H. 4 W. 4, have not been complied with, is absolute, in the first instance, *Trevanion* v. *Sargon*, 518.

XIV. Incidental Proceedings.

A. Commission to Examine Witnesses.

1. Delay on the part of the plaintiff is no objection to his obtaining a rule to examine a witness on interrogatories, who is going abroad. *Weekes* v. *Paul*, 131.

2. The Court will not order a commission to issue for the examination of a witness within the jurisdiction (under 1 W. 4, c. 22,) upon the ground of the witness being unable to attend the trial from an accident, without a positive affidavit of that fact. *Davies*, Dem. *Lowndes*, Ten., 379.

3. The defendant purchased some bricks to send to *Mauritius*; some of which he examined and approved of previously to their being shipped; upon an action being brought to recover their value, the defendant was allowed to have a commission to examine witnesses at *M.*, upon his paying into Court a sum on account of those bricks which he had approved of. *Ingram* v. *Bligh*, 382.

4. The Court will grant a commission to examine witnesses abroad, even after a cause is set down for trial, unless it clearly appears that the application is made for the purpose of fraud or delay. *Summers* v. *Rawson*, 511.

B. Demurrer.

1. A replication having been delivered on the *Wednesday* before *Easter-day*, a demurrer thereto, delivered on the following *Wednesday*, is in sufficient time under R., E. 2 W. 4. *Harrison* v. *Heathorn*, 192.

2. A defendant demurred to the declaration, but omitted to insert a marginal note to the demurrer, the Court allowed him to withdraw his demurrer, upon the terms of his pleading issuably, taking short notice of trial, and paying the costs. *Verbeke* v. *Pearce*, 244.

3. Where the defendant, towards the close of the Term, pleaded a plea obviously frivolous and bad, the Court ordered the case to be called on on the last day of Term, upon the plaintiff's giving notice to the defendant; and intimated that no demurrer books need be delivered. *Haworth* v. *Whyte*, 278.

4. Delivery of demurrer books. Suspending judgment on demurrer upon terms. *Fryer* v. *Smith*, 384.

5. A demurrer to a declaration against the acceptor of a bill, stating that it was drawn and indorsed by *T.* for *B.* & Co., having been set aside as frivolous by a judge's order, such order was rescinded, and the cause ordered to stand at the head of the demurrer paper. *Dawson* v. *Percy*, 384.

C. Inspection.

a. Of Documents.

Where affidavits refer to certain documents, the Court will, if necessary, inspect the originals. *Platel* v. *Dowse*, 38.

δ. Of Other Matters.

In an action by a builder, for work and labour in erecting a chapel, the Court refused him a rule to inspect the premises. *Newham* v. *Tate*, 244.

D. Rules.

A rule having been obtained, calling upon the plaintiff's attorney to enter the issue, and carry in the roll, without its being mentioned that the application had been previously refused at chambers, was discharged. *Engler* v. *Twysden*, 269.

E. Staying Proceedings.

1. The plaintiff brought an action upon a special contract to deliver bills of exchange as a security for goods sold: there was a demurrer to part of the pleadings, upon which the defendant obtained judgment; the costs of which were hung up until the trial of the issues in fact: before such trial, the defendant became bankrupt, and obtained his certificate, the plaintiff having proved for the amount of the goods. The plaintiff not proceeding to trial, the defendant's attorney proposed to take the cause down by proviso, whereupon the plaintiff applied to stay the proceedings. The Court ordered a *stet processus* to be entered upon payment of the costs of the demurrer by the plaintiff. *Whitaker* v. *Mason*, 102.

2. Where an action has been erroneously commenced against two defendants, the Court will not allow the plaintiff (unless he has been misled by the defendants) to discontinue, without payment of costs. *Poensgen* v. *Chanter*, 202.

F. Setting Aside Proceedings.

See ante, IV. E.; XI.; XIII. B.

XV. Irregularity.

See ante, XI.

A. Waiver.

1. Where the defendant objects to a trial taking place on the score of an irregularity in the record, and afterwards conducts his defence under protest:—*Held*, this is no waiver of such irregularity. *Blissett* v. *Tenant*, 6.

2. Three defendants were arrested upon a promissory note; one of whom, the administratrix of one of the makers, was discharged. The plaintiff declared against the other two only, who took several steps in the cause:—*Held*, on an application to set aside the declaration, that the irregularity in the declaration was waived on behalf of the two; the third defendant not being properly before the Court. *Bartrum* v. *Williams*, 108.

3. Serving summons for time to plead, is a "fresh step," within R., H. 2 W. 4, s. 33. *Coupland* v. *Cook*, 240.

4. 4th *Jan.*, issue joined; 8th *Feb.*, leave to amend plea, with liberty to plaintiff to postpone trial till Sittings after *Easter Term*. Notice of trial countermanded, and new notice given for the Sittings during *Trinity Term*. The record was afterwards withdrawn by agreement:—*Held*, this was a waiver of the previous default. *Cornish* v. *Robertson*, 396.

XVI. Special Case.

A. Right to Begin.

Upon the argument of a special case, where the verdict is entered for the plaintiff, he is entitled to begin, though by the pleadings the issue may be upon the defendant. *Stone* v. *Compton*, 436.

B. Judgment.

Upon the argument of a special case, the Court having ordered judgment to be entered for the defendant, subsequently, at the plaintiff's instance, directed a nonsuit to be entered instead. *Stone* v. *Compton*, 474.

XVII. Jurisdiction of Judges at Chambers.

An affidavit sworn in pursuance of R., H. 48 G. 3, for the purpose of obtaining an order to arrest the defendant in *trover*, is a *business depending* in Court, within the meaning of 11 G. 4, & 1 W. 4, c. 70, s. 4, and therefore any judge of the superior Courts may make such an order at chambers, though the cause is not in progress in the Court to which he belongs. *Driffill* v. *Taylor*, 150.

PRECEPT.

See Evidence, I. (E.) 3.

PRESENTMENT.

See Banker's Check.

PRINCIPAL AND AGENT.

See Evidence, II. (A.)
Frauds, Statute of.

Where an agent undertakes to effect an

insurance, if he fail in doing so, it is his duty to give notice to his principal. *Assumpsit* will lie for the breach of such duty; and the promise laid in the declaration need not be proved. *Callender* v. *Oelrichs*, 401.

PRINCIPAL AND SURETY.

See BILL OF EXCHANGE, I. II.
INSOLVENT.

As between principal and surety, if any material part of the transaction between the creditor and his debtor (in respect of which the surety enters into his engagement) is, with the knowledge or assent of the creditor, misrepresented to the surety (the misrepresentation being such, that, but for the same, the surety ship would not have been entered into, or being entered into, the extent of the surety's liability *may* thereby be increased,) the security given by the surety is not available against him, on the ground of fraud. *Stone* v. *Compton*, 436.

PRISONER.

1. If a prisoner sends for a party as his attorney to attest a warrant of attorney, he cannot afterwards set it aside on the ground that such person was uncertificated at the time, unless he shews he was not aware of that fact. *Semble*, that the fact of the attorney being himself a prisoner is of no importance. *Cox* v. *Cannen*, 203.

2. By the 7th section of the Act for the Abolition of Imprisonment for Debt (1 & 2 Vic. c. 110,) a judge is empowered to discharge any "prisoner who, at the time appointed for the commencement of the Act (*scil.* 1st of *October*, 1838,) shall be in custody upon *mesne process* for any debt." Where a defendant was out upon bail:—*Held*, that, upon an equitable construction of the Act, a judge might order an *exoneretur* to be entered on the bail-piece. *Bateman* v. *Dunn*, 374.

3. By the 3d and 7th sections, a defendant may be arrested or detained, if a plaintiff "shall, by affidavit, show to the satisfaction of a judge that there is probable cause for believing that the defendant is about to quit *England*, unless he be forthwith apprehended:"—*Held*, that the affidavit for that purpose ought to follow the words of the Act, and state the facts from which a probable cause for such belief may be inferred. *Id.*

4. A defendant taken in execution on the 27th of *November*, for a debt under 20*l.*, is entitled to his discharge on the 26th of *November* in the following year, being the last day of Term. *Poras* v. *Wilkins*, 382.

5. The Court, since the 1 & 2 Vic. c. 110, will stay proceedings on the bail-bond, and order it to be cancelled, upon an appearance being entered in the original action, on the application of the defendant in such action, without an affidavit of merits. *Norris* v. *Bighton*, 383.

PROCESS.

See PRACTICE, I.

PROCLAMATIONS.

See AMENDMENT, II. 2, 3.

PROFERT.

See EXECUTOR.

PROMISSORY NOTE.

See BILL OF EXCHANGE.
STAMP.

PROMOTIONS.

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RECITAL.

See BILL OF EXCHANGE, I.

RECORD.

See FOREIGN ATTACHMENT.

RE-ENTRY.

See LANDLORD AND TENANT, I. (C.)

RECOVERY.

See AMENDMENT, 3.

REGULÆ GENERALES.

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RELEASE.

See EVIDENCE, II. (C.)

REPAIR.

See EVIDENCE, I. (D.)

REPLEVIN.

See AMENDMENT, I. 2.
PLEADING, II. (D.)

RETAINER.

See ACTION, 2.

RIGHT OF WAY.

See WAY.

RULES.

See PRACTICE, XIV. D.

RULE TO COMPUTE.

See PRACTICE, VI.

RULES OF COURT.

48 Geo. 3. (Affidavit.) *Driffill* v. *Taylor*, 150.

T. 1 W. 4, s. 2. (Bail.) *Keough's Bail*, 243. *Du Burgh's Bail*, 371.

H. 2 W. 4, s. 33. (Irregularity.) *Coupland* v. *Cook*, 240.

E. 2 W. 4. (Demurrers.) *Harrison* v. *Heathorn*, 192.

H. 4 W. 4. (Pleading Rules.) *Kibblewhite* v. *Reynolds*, 510. *James* v. *Bourne*, 182.

————, r. xiij. (Reversing Judgment.) *Trevanion* v. *Sargon*, 518.

H. 6 W. 4. (Attorneys.) *In re Smithers*, 423.

SALE.

See AUCTION.
CONTRACT, I.; II. 2.

SEPARATION.

See ASSUMPSIT.

SEQUESTRATION.

A writ of *levari facias de bonis ecclesiasticis* having issued in 1834, the bishop, in 1838, was ruled to return what sums he had, from time to time, levied under the writ; he made a return, setting out certain items of receipt and disbursement:—*Held*, insufficient, inasmuch as it did not state that the items of receipt were all that had been received, or that the payments had been actually made. *Alchin* v. *Hopkins*, 399.

SERVICE OF RULE.

See PRACTICE, VI. B

SESSIONS.

See JUSTICES OF THE PEACE.

SET-OFF.

See PLEADING, I. (B.)

SETTING ASIDE PROCEEDINGS.

See PRACTICE, XIV. F.

SETTLEMENTS.

See VOLUNTARY CONVEYANCE.

SHERIFF.

See ESTOPPEL, 1.
EVIDENCE, 5.

A. DUTY ON ARREST.

There is no obligation in law upon a plaintiff, upon his delivery of a *capias* to the sheriff, to give him such information as will enable him to identify and arrest the defendant. Therefore, a plea by the sheriff, in an action against him for not arresting, that after the delivery of the writ, and before a countermand by the plaintiff, the latter had given him no such information:—*Held*, bad on demurrer. *Dyke* v. *Duke*, 11.

B. Attachment.

1. An attachment will not be granted against a sheriff for not bringing in the body into the *Common Pleas*, where in the copy of the writ delivered to the defendant he was required to put in bail in the *Exchequer of Pleas*, and bail had been put in accordingly. *Mayhew* v. *Hoadley*, 161.

2. Attachment granted against the sheriff, for not bringing in the body, notwithstanding the Imprisonment for Debt Act. *Seel* v. *Inge*, 372.

C. Adverse Claims.

1. Where a sheriff (having, under an execution, seized goods claimed by a third party,) obtains an interpleader rule, the Court will not stay proceedings against him, instituted by the claimant, unless the sheriff has given him notice of his application. *Burleigh* v. *England*, 106.

2. If, after the rule *nisi* has been obtained, the sheriff withdraws from possession by the directions of the execution-creditor, and subsequently comes to make the rule absolute, the Court will make him pay the plaintiff's costs, but not those of the execution-creditor. *Id.*

3. The sheriff having executed a *fi. fa.*, received a *notice* that a docket had been struck against the defendant, and subsequently another *notice*, from the solicitor to the assignees, that a *fiat* had issued: he was also served with a *claim* by a third party, whose property had been seized under the execution:—*Held*, that such *claim* was sufficient to entitle the sheriff to relief under the Interpleader Act. *Semble*, that the *notices* were also sufficient for that purpose. *Tarleton* v. *Dumelow*, 394.

D. Election of M. P.

It is the duty of the sheriff to return the precept for an election of an M. P. to the crown office, together with the writ and indentures. *Webb* v. *Smith*, 145.

SHIPPING.

See Bill of Lading.
Charter-Party.
Insurance.

SLANDER.

See Practice, III. B. 2.

A., seeing that apartments were to let at a house occupied by *B.*, enquired who was the landlord, of *C.* (a neighbour of *B.*'s;) *C.* told him, and added that *B.* had not paid his rent, and that if *A.* moved in his goods, they would be seized. *B.* having sued *C.* for slander, the judge, at the trial, told the jury "he thought it was a privileged communication by *C.*, unless they were of opinion it was made maliciously; that the question for them was, did the defendant honestly believe, at the time he spoke the words, that the statement contained in them was true, or was he actuated by malice in making such statement:"—*Held*, that there was no misdirection. But the Court granted a new trial, not being satisfied of the *fact*, whether *C.*'s statements were made officiously, or in answer to *A.*'s enquiries. *Chapman* v. *Wright*, 241.

SPANISH BONDS.

See Frauds, Statute of.

SPEAKER'S CERTIFICATE.

1. Judgment may be entered up against one of several parties, mentioned in the Speaker's certificate, as liable to pay the costs of an election petition (under 9 G. 4, c. 22, s. 63,) for the whole amount of such costs, even though actions have been commenced against all the other parties. *Fector* v. *Beacon*, 525.

2. The above Statute, which gives authority to the Speaker so to certify, is not a penal enactment. *Id.*

3. The application to the Speaker, to appoint the taxation, may be made by the agent of the party in whose favour the committee have reported. *Id.*

4. It is no objection to the certificate that the name of the party, entitled to the costs, appears for the first time therein, the name of *A. B.* being inserted in the former documents, if it sufficiently appears from affidavits that *A. B.* was the agent of such party. *Id.*

5. As the certificate is, by the Statute, conclusive as to the amount of the costs, it is no objection that, in a certificate in favour of a sitting member, the costs of an elector, admitted to defend the return, are included. *Id.*

SPECIAL CASE.

See Practice, XVI. A.

SPECIAL JURY.

See Practice, III. A. 2

STAKE-HOLDER.

See Costs, II. 3.

STAMP.

See LANDLORD AND TENANT, I. (A.) VOLUNTARY CONVEYANCE.

1. By the 56 G. 3. c. 5, (the *Irish* Stamp Act,) bills of lading require to be stamped; and by the third section, no unstamped writing, which ought to have been stamped, shall be received in evidence in any Court in *Ireland*, or admitted in any Court in *Ireland* to be good or available in law or in equity. *Gatliffe* v. *Bourne*, 82.

2. *Quære*, whether a bill of lading made in *Ireland*, having no stamp, can be received in evidence here. *Id.*

3. A letter in these terms: "I have received the sum of 20*l.*, which I have borrowed of you, and I have to be accountable for the said sum, with legal interest:"—*Held*, to be admissible in evidence without a promissory note stamp, especially as it had been stamped with an agreement stamp. *Horne* v. *Redfearn*, 190.

STATUTES.

34 & 35 H. 8, c. 20. (Estates-tail.) *Duke of Grafton* v. *London and Birmingham Railway Company*, 363.

29 Car. 2, c. 3, sec. 17. (Frauds.) *Pawle* v. *Gunn*, 200.

8 & 9 W. 3, c. 11, s. 8. (Assignment of Breaches.) *Scott* v. *Staley*, 274.

9 Anne, c. 14. (Gaming.) *Martin* v. *Smith*, 194.

2 G. 2, c. 23, s. 23. (Attorneys' Bills.) *Curling* v. *Sedger*, 262. *Russell* v. *Yorke*, 507.

2 G. 2, c. 24. (Bribery.) *Webb* v. *Smith*, 145.

23 G. 2. (*Tower Hamlets* Court of Requests.) *Green* v. *Bolton*, 142.

29 Geo. 2, c. 36. (Inclosure.) *Cantrell* v. *Windsor Union*, 133.

9 G. 3, c. 61. (Licensing Public Houses.) *Bryant* v. *Beattie*, 65.

17 G. 3, c. 50, s. 8. (Auction.) *Malins* v. *Freeman*, 177.

39 & 40 G. 3, c. 99, s. 6. (Pawnbroker.) *Fergusson* v. *Norman*, 418.

43 G. 3, c. 46. (Costs.) *White* v. *Prickett*, 61. *Clare* v. *Cook*, 81. *Day* v. *Clarke*, 385.

———, s. 2. (Payment into Court in Lieu of Bail.) *Reynolds* v. *Wedd*, 230. *Hannah* v. *Willis*, 117.

56 G. 3, c. 5. (Stamps, *Irish*.) *Gatliffe* v. *Bourne*, 82.

6 G. 4, c. 16, s. 82. (Bankrupt Act.) *Wright* v. *Pearnley*, 413. *Butler* v. *Hobson*, 93.

7 G. 4, c. 57, s. 30. (Insolvent Act.) *Butler* v. *Hobson*, 93.

7 & 8 G. 4, c. 71. (Bail.) *Hannah* v. *Willis*, 117.

9 G. 4, c. 61, sec. 14. (Licensing Act.) *Bryant* v. *Beattie*, 65.

11 G. 4, and 1 W. 4, c. 70, s. 4. (Jurisdiction.) *Driffill* v. *Taylor*, 150.

———, s. 28. (Fines and Recoveries.) *Evans* v. *Davis*, 486.

1 W. 4, c. 22. (Commission to examine Witnesses.) *Davies* v. *Lowndes*, 379.

1 & 2 W. 4, c. 42. (Inclosure.) *Matson* v. *Cook*, 172.

2 W. 4, c. lxv. (*Tower Hamlets* Court of Requests.) *Green* v. *Bolton*, 142.

3 & 4 W. 4, c. 74. (Married Woman.) *In re Eady*, 156. *Ex parte Birch*, 172. *Ex parte Shirley*, 484.

———, c. 98. (Usury.) *Berrington* v. *Collis*, 543.

4 & 5 W. 4, c. 76. (Poor.) *Cantrell* v. *Windsor Union*, 133.

6 & 7 W. 4, c. cxxxvij. (*Westminster* Court of Requests.) *White* v. *Seffert*, 132.

7 W. 4, and 1 Vic. c. 56. (Attorneys.) *Newton* v. *Spencer*, 10.

1 Vic. c. 80, s. 1. (Bills of Exchange.) *Berrington* v. *Collis*, 543.

1 & 2 Vic. c. 110. (Imprisonment for Debt.) *Bateman* v. *Dunn*, 374. *Norris* v. *Bighton*, 383. *Seel* v. *Inge*, 372.

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See EVIDENCE, I. (F.)
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TRIAL.

See PRACTICE, XV. 1.

TROVER.

See COSTS, III. 1.
PLEADING, II. (F.)

A wrongful taking of a chattel is a sufficient conversion to support trover, without proof of a subsequent demand and refusal. *Grainger* v. *Hill*, 42

USAGE.

See EVIDENCE, I. (B.)

USURY.

The Statutes 3 & 4 W. 4, c. 98 (s. 7,) and 1 Vict. c. 80, (s. 1,) do not extend to cases where a bill or note is given in addition to a security of another nature, upon which the debt was really contracted. Therefore, a loan made at more than 5 *per cent.*, upon the security of a deposit of a lease, a promissory note and a warrant of attorney, *held* not to be protected by those Statutes. *Berrington* v. *Collis*, 543.

VARIANCE.

See PRACTICE.

VENIRE.

See PRACTICE, X.

VENUE.

See PRACTICE, III.

1. The Court will not change the *venue*, upon affidavits stating that one of the parties had large estates in the county and had great influence there. *Davies* v. *Lowndes*, 272.

2. Change of *venue*, where impartial trial could not be had. *Jones* v. *Price*, 373.

3. Rule granted to change the *venue* from *London* to *Worcestershire*, in an action for breach of agricultural covenants in a lease, upon an affidavit that all the witnesses to be examined on both sides resided in the latter county; terms being imposed to prevent the plaintiff being delayed in obtaining judgment. *Pratt* v. *Starling*, 396.

VERDICT.

See PRACTICE, XII.

VICE-ADMIRALTY COURT.

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VOLUNTARY CONVEYANCE.

A., having entered into a contract with *B.* for the purchase of an estate, by an ante-nuptial settlement, reciting such contract, covenanted that, if *B.* should be enabled to convey the estate to him, he would convey the same to the trustees under the settlement; provided, that if *B.* should not be able to convey, *A.* should be under no obligation to procure a conveyance from any other party, or to pay its value to the trustees: nor should *A.* be precluded

from purchasing the estate for his own benefit. *B.* was not able to convey; and *A.*, after his marriage, purchased the estate from the owner, and then conveyed it to the trustees under the marriage settlement; he afterwards mortgaged the estate to *C.*, in fee for 10,000*l.*: subsequently the mortgage was transferred to *D.*, the deed stating the consideration to be 10,000*l.* paid to *C.*, and 4,000*l.* paid to *A.*; the payment of the former sum was proved, but not that of the latter. *D.* mortgaged to the plaintiff:—*Held, first*, that the *post*-nuptial settlement was voluntary, and consequently void as against a purchaser for a valuable consideration; *secondly*, that there was sufficient proof of a valuable consideration for the transfer to *D.*; *thirdly*, that an *ad valorem* stamp in respect of 4,000*l.* was sufficient upon the mortgage to *D.* *Doe*, dem. *Barnes* v. *Roe*, 279.

WAGER.

See PLEADING, II. (A. *b.*) 1.

WAIVER.

See PRACTICE, XV. A.
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WALL.

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WARRANT.

See JUSTICES OF THE PEACE.

WARRANT OF ATTORNEY.

See COGNOVIT.
PRISONER, 1.

WASTE LANDS.

See EVIDENCE, I. (F)

WATER COURSE.

See WAY, 3.

In *case* for obstructing the plaintiff's right to a water-course which was not set out by metes and bounds, it is no answer that within twenty years the stream had intermitted flowing, or its channel had been altered. *Hall* v. *Swift*, 157.

WAY.

See CONTRACT, II. 2.

1. By a lease of a house, *with all appurtenances*, a right of way, necessary for the convenient occupation of such house, and previously enjoyed by the tenant, will pass. *Hinchliffe* v. *Lord Kinnoul*, 342.

2. In 1728, the ancestors of *G.* granted a lease of certain uncovered land for a term of years (expiring at *Lady-day*, 1824). The land was subsequently built upon, and in 1819, the residue of the term in a house (parcel of the first demised premises), had vested in the plaintiff; this house abutted on a passage, (also part of the said premises,) a right of way in which had been exercised by the plaintiff and his predecessors, and which was necessary for the convenient occupation of the house, and to enable the occupier thereof to repair the wall abutting on the passage: in the last-mentioned year, *G.* granted to plaintiff a lease of the house, with all appurtenances, as then occupied by him, from *Lady-day*, 1824 (stated as the period when the original lease would determine); plaintiff covenanting to repair all walls, &c.; and in 1822, *G.* granted a lease of the adjoining premises (including the passage), to *H.* (whose interest afterwards vested in the defendant), from the time when the original lease would determine:—*Held, first*, that the right of way vested in the plaintiff as an easement, by the lease of 1819; and, *secondly*, that the reversionary lease granted in 1819, took effect in possession immediately on the determination of the former lease; and consequently, that there was no unity of possession in *G.*, by which such easement could be destroyed. *Id.*

3. The plaintiff enjoyed a prescriptive right of way over a piece of open land (called *W. F.*) to certain sluices erected on a water-course there. By an Inclosure Act, *W. F.* was allotted to the defendant, and certain other lands to the plaintiff, and all ways over *W. F.* were to be extinguished as soon as the defendant had made another public road, provided that nothing contained in the Act was to deprive the plaintiff of the right of ingress, &c., to the said water-course: the defendant made the new road, and set out another way for the plaintiff:—*Held*, that his old right of way was not extinguished. *Adeane* v. *Mortlock*, 488.

4. In an action by a reversioner for a nui-

sance a tenant who is injured by the nuisance is a competent witness. *Id.*

5. Therefore, under the above circumstances, a tenant of the plaintiff's, whose land was irrigated from the water-course, was a good witness. *Id.*

WILL.

See DEVISE.
EXECUTOR.

WITNESS.

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Common Pleas.

April 15.

The re-admission of an attorney in any of the superior Courts is equivalent to an original admission, so as to entitle him to practise in the other Courts.

Ex parte MARTIN.

MARTIN applied to re-admit an attorney in this Court, who had been re-admitted last Term in the Queen's Bench, the officers of the Court having expressed a doubt whether the 1 & 2 *Vict.*, c. 45, s. 3 (*a*), applied to such a case.

TINDAL, C. J.—It does not appear to me that the motion is necessary. Re-admission is equivalent to admission; and, therefore, this gentleman having been admitted in the Queen's Bench, is entitled to practise in this Court.

(*a*) Enacting, that any person entitled to be admitted an attorney of any of the Courts at Westminster, shall, after being sworn in and admitted as an attorney of any one of the said Courts, be entitled to practise in any other of the said Courts, upon signing the roll of such Court, in like manner as if he had been sworn in and admitted an attorney of such Court.

April 15.

HUTCHINSON *v.* MORLEY.

If a purchaser is induced, by the false representations of a third party, to enter into an agreement, he may annul the purchase.

ASSUMPSIT for money had and received. Plea, non assumpsit. At the trial, before *Erskine*, J., at the Sittings for Westminster after last Term, it appeared that the plaintiff had entered into a special agreement in writing to take the lease of a public-house, including the fixtures, from the outgoing tenant, *Lingham*. The defendant was the valuer between them. The agreement, as originally drawn up, had contained some stipulation as to the *good-will*, but this stipulation had been struck out. In consequence of the statements by the defendant as to the profits, the plaintiff was induced to pay 20*l.*, instead of 10*l.*, as a deposit on the purchase, remarking, that if the house turned out according to the defendant's representations, he had no objection to pay that sum. The concern not being so profitable as stated by the defendant, the plaintiff refused to complete the contract, and brought an action against the defendant for the deposit, and the jury gave him a verdict for the 20*l.*

Andrews, Serjt., now moved for a new trial, on the ground that the verdict was against evidence. The question was, whether the word "*good-will*" had not been struck out of the agreement in pencil before or after a conversation thereon. The parol representations of *Morley* cannot vitiate a written agreement.

TINDAL, C. J.—The *good-will* was no part of the original agreement. If

a party is induced, through the representations of another, to enter into an agreement, and those representations turn out to be false, that will vitiate the contract quite as much as if it had formed part of the terms of the contract itself.

Rule refused.

HAMPSHIRE *v.* HARRIS.

April 19.

IN this case, which had been tried before the Secondary, when the plaintiff recovered a verdict,

The Court will not postpone the period of shewing cause to a rule nisi for a new trial, in order that an indictment for perjury against a witness may be tried in the mean time.

C. Jones obtained a rule nisi for a new trial; and he prayed that the rule might be drawn up for next Term, upon the ground that the principal witness for the plaintiff had been indicted for perjury in his evidence at the trial, and a bill had been found by the grand jury; and if the new trial were to come on before the indictment, the witness might swear to the same false evidence as on the former trial; but

THE COURT refused the application, saying it would be unfair to the witness, and cast a slur upon him; and that the rule was to take no notice of an indictment for perjury on a motion for a new trial (*a*).

(*a*) See *Pott* v. *Parker*, 2 Chit. R. 269; *Steeley* v. *Mayhew*, 4 Bing. 561

TYERS *v.* STUNT.

April 19

ASSUMPSIT for goods sold Plea, the defendant's discharge under the Insolvent Act (*a*).

Where an insolvent is indebted in two separate debts to the same creditor, and inserts only one in his schedule, he remains liable to be sued for the other.

At the trial, before *Arabin*, Serjt., it appeared that the action was brought for two sums; viz., 4*l.* 14*s.* 6*d.*, and 3*l.* 9*s.* 8*d.*, the amount of goods supplied on two separate occasions. On the part of the defendant were produced copies of his schedule, and of the proceedings, which are made evidence by the 76th section (*b*). The plaintiff's name was inserted in the schedule as a creditor of the defendant's, but only for the former sum. It was contended on behalf of the plaintiff, that he was entitled to a verdict for the latter sum, and the learned judge being of that opinion, the jury found a verdict accordingly, whereupon

(*a*) 7 *Geo.* 4, c. 57.

(*b*) Enacting, that "a copy of the petition, schedule, order and other orders and proceedings under the Act, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, &c., and sealed with the seal of the Insolvent Court, shall be admitted in all Courts, &c. as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the Court as aforesaid."

Common Pleas.

TYERS v. STUNT.

Ryland moved that it might be set aside, and a verdict entered for the defendant. Under the 40th section (*c*) the defendant ought to have inserted both sums in his schedule; but such an omission is expresly provided for by the 63d section (*d*). The debt due from the defendant was the aggregate of the two sums, and the entry in the schedule is, therefore, only an error in the amount. The proper course for the plaintiff would have been, either to have gone before the Insolvent Court, and have had the matter rectified, or to have replied the circumstances specially under the 61st section (*e*).

PER CURIAM.—It appears that the plaintiff was named in the defendant's schedule as a creditor, but not in respect of the debt for which he has now recovered; for this is a case where one of two distinct and separate debts has been omitted in the schedule, and not a case of a merely inaccurate statement of the amount of a debt. The defendant has pleaded his discharge from both these debts: but as he has only inserted one of them in his schedule, he is only discharged from that one, and still remains liable for the other.

Rule refused (*f*).

(*c*) Enacting, that "every prisoner, who shall apply for relief, shall, within fourteen days next after his petition shall have been filed, deliver into the Court a schedule, containing a description of such prisoner, &c., and also a full and true description of all debts due or growing due from such prisoner at the time of filing such petition, and of all persons to whom such prisoner shall be indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively, &c."

(*d*) By which, if there is any error in the schedule, without fraud, the Act operates upon the actual amount of the debt.

(*e*) Enacting, that "if any action shall be brought against any prisoner for any such debt, it shall be lawful for him to plead generally that he was duly discharged according to the Act, &c., whereto the plaintiff may reply generally, and deny the matters pleaded, or reply any other matters which may shew the defendant not to be entitled to the benefit of the Act," &c.

(*f*) See *Bishop* v. *Polhill*, 1 M. & Rob. 363.

April 20.

WARD *v.* SUFFIELD.

In an action against a surety for the default of his principal in not paying over certain sums received by him, it was proved that the defendant had admitted his liability to pay the account as agreed to be-tween the plaintiff and the principal, and which account had been sent to him, the defendant. This account not being produced at the trial in pursuance of notice, a witness was called, who proved that the account sent to the defendant was the account which had been gone over by the plaintiff and the principal, and which the principal admitted to be correct:—*Held*, that this evidence was properly admitted.

ASSUMPSIT, upon a guarantee by the defendant, to be responsible for all sums which one *H. New* might receive as the plaintiff's agent, not exceeding 200*l.*

At the trial, before *Gurney*, B., at Worcester, the defendant's signature to the guarantee being proved, (to which one *Bradley* was also a party,) a letter was put in from the defendant to the plaintiff, requesting to be furnished with the copy of the plaintiff's account with *New*; and then a letter from the plaintiff's attorney to the defendant, containing as follows:—"On the other side you have accounts between *Ward* and *New, as agreed to by the latter*, by which a balance of 183*l.* 9*s.* 2*d.* is due to Mr. *Ward*." To this the defendant replied:—"In reply to yours of this morning I have sent by

this evening's post to Mr. *Bradley* for his share, which, when I have received, I will remit with mine to Mr. *Ward*." Notice was given to the defendant to produce the account mentioned in the letter from the plaintiff's attorney; it was not however produced. A witness was then called on the part of the plaintiff, who produced an account which he proved to be a duplicate of that sent to the defendant; and then another witness also stated that he went over this last account together with *New*, and that *New* admitted it to be correct. This evidence was objected to, on the ground that *New* himself should have been called, and that his declarations were not evidence against the defendant. The judge admitted the evidence, and a verdict having been found for the plaintiff for 150*l*.,

R. V. Richards, in Easter Term, 1838, obtained a rule nisi for a new trial, on the ground that the evidence of *New's* admission ought not to have been received, urging that in *Goss* v. *Watlington* (*a*), *Whitnash* v. *George* (*b*), *Middleton* v. *Melton* (*c*), and that class of cases in which similar evidence had been received, the party making the admission was dead: and the evidence having been improperly received, however slight it might have been, there ought to be a new trial, agreeably to the principle of *Crease* v. *Barrett* (*d*).

Talfourd, Serjt., now shewed cause.—*New's* declaration was not used as an admission by him against the defendant, but as identifying the account, and connecting it with the defendant's own admission, as contained in his letter. Besides, the plaintiff's case was complete without this evidence, which was wholly immaterial and unnecessary, in which case, the admission of it is not a sufficient ground for a new trial, *Doe*, dem. Lord *Teynham* v. *Tyler* (*e*). *Crease* v. *Barrett* was a case of rejection of evidence, where a party may justly complain that his case has not been fairly presented to the jury; but superfluous evidence ought not to invalidate a verdict which might have been maintained without it. Substantial justice has, at any rate, been done in this case.

R. V. Richards, contrà.—The question is, whether, where evidence has been admitted which ought to have been rejected, the Court will put themselves in the place of a jury, and say what effect it must have had on their minds. Apart from the evidence of what *New* had said, there was nothing but the defendant's letter, which did not amount to an admission of anything. It is no answer to say that substantial justice had been done. In *De Rutzen* v. *Farr* (*f*), and *Wright* v. *Tatham* (*g*), the evidence objected to was superfluous, but it having been improperly received, the Court granted new trials. The plaintiffs in this case might have relieved themselves from all difficulty by calling *New*; and the case must now be looked at as if a bill of exceptions had been tendered.

TINDAL, C. J.—I think that this rule may be discharged without breaking in upon any rule of evidence, or on the law as laid down in *Crease* v. *Barrett*.

(*a*) 3 B. & B. 132; 6 Moo. 355.
(*b*) 8 B. & C. 556.
(*c*) 10 B. & C. 317.
(*d*) 1 Cr. M. & R. 919; 1 Tyr. & Gr. 112.
(*e*) 6 Bing. 561; 4 Mo. & P. 377.
(*f*) 1 Har. & Wol. 735; 4 A. & E. 53; 6 Nev. & Man. 776.
(*g*) 4 New Cases, 489; 6 Scott, 58.

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It may be admitted, that the account, as gone into between the principal and the clerk was no evidence against the surety; therefore, unless it was made evidence by some admission of the defendant himself, it ought not to have been received. Then what is the case? The defendant sends a letter, asking for the account between the plaintiff and *New*. The account is sent, making 183*l.* 9*s.* 2*d.* to be due. This, coupled with the defendant's answer, may be taken as an admission by the defendant to the extent of the demand, and of the correctness of the account between *Ward* and *New*. It is then necessary to produce this account, and to identify it as the account between *Ward* and *New*. A witness is then called, who produces an account, which was the account settled between the plaintiff and *New*. This would have been enough, but another witness is called, who further proves, that the account sent to the defendant was the very original account which *New* had gone over. It may be said not to have been evidence for the jury at all, but necessarily admitted in order to guide the discretion of the judge as to the admission of the secondary evidence

BOSANQUET, J.—I think the evidence was properly received. An account is sent to the defendant, and the defendant in answer says he will send his share. That is an admission of his liability. But it is said, that the account sent with the letter might not have been the account agreed on by *New*. Evidence was admissible to shew that it was the same; and this evidence cannot be looked upon as a declaration by *New*, but merely as a proof of identity of the account, which the defendant must be taken to have already agreed to be bound by.

COLTMAN, J.—I do not think it was competent to endeavour to give additional credit to the account by asking whether *New* agreed to it; but I think the evidence was admisible to identify a particular account with the account sent to the defendant.

ERSKINE, J.—In the first place there can be no doubt that the account was properly received as the copy of the one furnished to the defendant, The answer of the defendant was written on the faith of that being the one agreed to by *New*. If it had been left to the jury to say whether any particular amount, and what, had been agreed to by *New*, I should have thought the evidence inadmissible; but the clerk only identified the account by his own knowledge of what was the account agreed to by *New*.

Rule discharged.

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2 *Arnold*, 7.

In an action upon a bill of exchange, the defendant deposited a sum of money with the sheriff, and 10*l.* for costs, in lieu of a bail-bond, under the 43 G. 3, c. 46, s. 2. A rule obtained by the plaintiff for payment of this money out of Court to him was made absolute. The plaintiff did not enter an appearance for the defendant. A subsequent rule, obtained by the defendant, for allowing the money paid over to the plaintiff, and the further sum of 10*l.* paid into Court by the defendant under the 7 & 8 G. 4, c. 71, s. 1, to be considered in lieu of special bail, was discharged Both these rules were silent as to costs. A third rule, obtained by the defendant for delivering up the bill to him, *on payment of* the debt and *costs*, was made absolute.

Held, that the plaintiff was entitled to the costs of the third rule, by the express terms of it, but not to those of the two former rules, as they could not be considered as made in the course of the cause, the plaintiff, by not entering an appearance, having in effect elected to abandon the action.

IN Easter Term, 1837, a rule obtained by the plaintiff for taking money out of Court, which had been deposited by the defendant in lieu of a bail-bond, (under the 48 *Geo.* 3, c. 46,) was made absolute (*a*).

The plaintiff not having entered an appearance, the defendant, in Michaelmas Term, 1837, obtained a rule *nisi* that the money so paid out of Court to the plaintiff, and a sum of 10*l.* paid into Court by the defendant on the 6th May, (under the 7 & 8 *Geo.* 4, c. 71,) should be deemed equivalent to his having put in and perfected bail. In Hilary Term, 1838, this rule was discharged (*a*). Both these rules were silent as to costs.

In Michaelmas Term, 1838, a rule, obtained by the defendant, was made absolute by consent, that the bill should be delivered up to him, and the 10*l.*, paid into Court in lieu of special bail, restored to him, *on payment of the debt and costs* (*b*).

On the taxation, the Master refused to allow the plaintiff the costs of any of the rules; those of the two first, on the ground that they were silent as to costs, and that the plaintiff having, by taking the money out of Court, elected to put an end to the action, they were not costs in the cause; and those of the last rule, on the ground that the detention of the bill by the plaintiff was improper.

Wilde, Serjt., on a former day, obtained a rule nisi for a review of taxation, contending that the plaintiff was entitled to the costs of the three rules, by the terms of the last rule, which was drawn up on payment of costs generally.

Bompas, Serjt., and *Petersdorff*, now shewed cause.—The plaintiff is clearly not entitled to the costs of the first two rules, as they are silent as to costs, *Anon.* (*c*); and the plaintiff having, by taking the money out of Court, and declining to proceed further, thereby put an end to the cause, they cannot be costs in the cause. The plaintiff, under 43 *Geo.* 3, c. 46, s. 2, cannot, in any case, obtain costs to a greater amount than 10*l.*, where he takes the money out of Court.

Wilde, Serjt., in support of the rule.—The money having been paid into Court under the 43 *Geo.* 3, c. 46, but the defendant having neglected to fulfil the provisions of 7 & 8 *Geo.* 4, c. 71, the plaintiff became entitled to have the money paid out to him. He could have sued on the bail-bond under the old law. If the sheriff's officer has misconducted himself, the

(*a*) 1 Arnold, 117; 4 New Cases, 310; 5 Scott, 731; 6 D. P. C. 417.

(*b*) A rule had been previously applied for, that the bill might be given up, on payment of the debt and costs, exclusive of the costs of the former rule, but this was refused: See 1 Arnold, 378.

(*c*) 1 Chit. Rep. 399, n.

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defendant has his remedy against him, either by action or summary application to the Court. The cause even up to this point has not been legally determined; and all costs of motions in the course of the cause, where no mention is made of costs, are costs in the cause, *Johnson* v. *Closs* (*d*), *Hullock* on Costs (*e*). When a plaintiff is adjudged entitled to take money out of Court, that money may be taken as payment *pro tanto*, and it does not finish the cause. As long as the cause is in Court, the plaintiff has to determine whether he will go on. The defendant comes and asks to have the security given up to him, on payment of costs. When this rule is made absolute, and not till then, the cause is determined. With regard to the case cited on the other side, the practice there laid down is only applicable where the suit is determined.

TINDAL, C. J.—This rule prays for a review of the taxation on two grounds; first, that the Master has not allowed the plaintiff the costs of the rule of last Michaelmas Term, for delivering up the bill of exchange, on which the action was brought, to the defendant; secondly, that he has disallowed the costs of two rules that were disposed of in Easter and Michaelmas Terms, 1837, in which no mention was made of costs.

With respect to the rule of last Michaelmas Term, inasmuch as the rule was expressly granted on condition of payment of costs, I think the plaintiff is clearly entitled to them.

But I think he is not entitled to the costs of the two former rules. He certainly was not entitled to them by the terms of the rules, for they made no mention of costs; nor are they, in express terms, included in the rule of Michaelmas Term last. If he is entitled at all to the costs of the two former rules, it must be on the general principle, that the costs of rules obtained in the course of a cause, in which no mention is made of costs, are costs in the cause. But according to the position in which the parties in this case stand, it appears to me that the costs of the two rules in question were not incurred in the course and progress of the cause.

The defendant having deposited with the sheriff the sum of 200*l.* for the debt, and 10*l.* for the costs, under the Statute 43 *Geo.* 3, c. 46, but having omitted to pay in the additional 10*l.*, under 7 & 8 *Geo.* 4, c. 71, in proper time, the plaintiff obtained a rule to have the money so deposited paid out to him. The plaintiff had his option, then, either to abandon the cause, or to proceed with it, upon entering an appearance for the defendant. The defendant applied to have an appearance entered, and that the cause might be proceeded with; but the plaintiff opposed this, on the ground that he was entitled, by the Statute, not to proceed with the action if he thought fit. It is said, the cause must be considered to be out of Court until disposed of by a legal termination. But situated as these parties were, there could be no legal termination to the suit. The defendant's entering an appearance was irregular; and he not being in Court, the plaintiff could not obtain judgment against him; nor could he *non pros* the plaintiff. The terms of the 2d section of 43 *Geo.* 3 could not be complied with: it enacts, among other things, that "in case the defendant shall not duly put in and perfect bail to the action, then, and in such case, the money so deposited and paid into Court shall, by order

(*d*) 1 Chit. Rep. 559. (*e*) Vol. 2, pa. 625.

of the Court, upon motion to be made for that purpose, be paid over to the plaintiff in the action, who shall be thereupon authorized to enter a common appearance, or file common bail, for the defendant, if the said plaintiff shall so think fit, such payment to the plaintiff to be made subject to such deduction, if any, from the sum deposited and paid to answer costs as aforesaid, as upon the taxation of the plaintiff's costs, as well of the suit as of the application to the Court in that behalf may be found reasonable." This appears to contemplate an application by the defendant to obtain back part of the 10*l.* deposited for costs, and not to allow the plaintiff to take out the money, and go on to increase the costs beyond that amount.

The ordinary legal termination of the suit by judgment, therefore, was not to be looked for in this suit; but I am of opinion that it was at an end when the plaintiff took the money out of Court, and did not proceed further, not having to this day entered an appearance.

BOSANQUET, J., and COLTMAN, J., of the same opinion on both points.

ERSKINE, J.—I am of the same opinion. According to the true construction of 43 *Geo.* 3, c. 46, sec. 2, it seems to me, that where a plaintiff takes the money out of Court, which had been deposited with the sheriff, and does not proceed in the suit by entering an appearance, or filing common bail, he cannot have more than 10*l.* costs.

Rule absolute.

BOYS *v.* ANCELL.

April 20th.

COVENANT. The declaration stated, that by an agreement, made *by and between the defendant of the one part, and the plaintiff of the other part*, the defendant covenanted that he would, within the space of one month then next ensuing, well and effectually, by indenture, demise to the plaintiff, his executors, administrators and assigns, two messuages, &c., for the term of ten years, at the yearly rent of 100*l.*; and it was agreed, that in the said indenture there should be contained covenants, on the part of the plaintiff, to pay the yearly rent, and also to repair the messuages, &c., to take the fixtures at a valuation, to abstain from carrying on certain trades therein, and to insure the premises during the continuance of the term; and it was also agreed, that the said indenture should contain a proviso for re-entry for non-payment of rent, and all other usual and reasonable covenants, including a covenant, on the part of the defendant, for quiet enjoyment; and the plaintiff covenanted to accept such lease, upon the terms and conditions specified, and to execute a

An agreement under seal, purporting to be made between *A.* (the defendant), *G. M.* and *J. H.*, as trustees under a will, of the one part, and the plaintiff of the other part, was executed by the defendant and plaintiff only: it was declared upon as a deed made between the defendant of the one part and the plaintiff of the other part.—*Held*, that this was such a variance, as the Judge at Nisi Prius, or the Court, had power to amend under 3 & 4 W. 4, c. 42, s. 23.

By the agreement the defendant covenanted that he and his co-trustees would, within a given time, execute a lease of certain premises to the plaintiff, which should contain certain covenants, and the plaintiff covenanted to accept such lease and execute a counterpart, and pay the expences of making such lease, counterpart and agreement; and for the true performance of the agreement, each of the parties bound himself in the *penalty* of 500*l.*, to be recovered against the defaulter as *liquidated damages*.—*Held*, that this sum must be considered as a *penalty*, and not as *liquidated damages*.

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counterpart thereof, and bear and pay the expences of making the lease and counterpart, and of the said agreement and a counterpart thereof, the said lease and counterpart to be prepared by the solicitor of the defendant; and for the true performance of the agreement, each of the parties bound himself unto the other in the *penalty* of 500*l.*, to be recovered against the defaulter as *liquidated damages*. Averment, that the plaintiff was always ready and willing to accept such lease, upon the terms and conditions specified, and to execute a counterpart thereof, and to bear and pay the expences of making the lease and counterpart, and of the agreement and counterpart thereof, of all which the defendant had notice. Breach, that the defendant did not, within the space of one month after making the agreement, well or effectually, by indenture, or otherwise, demise to the plaintiff the said messuages, &c., by means of which premises the defendant became liable to pay to the plaintiff the sum of 500*l.*, after the expiration of one month from the time of making the said agreement, on request; and although the said period of one month from the time of the making of the agreement had elapsed, before the time of the commencement of the suit, yet the defendant, although often requested to do so, had not as yet paid the said sum of 500*l.*, or any part thereof, to the plaintiff.

Plea, non est factum.

At the trial, before *Vaughan*, J., at the Sittings in London in Easter Term last, it appeared, that the agreement (which was under seal) purported to be made between the defendant and *G. Moody* and *J. Morris*, devisees in trust under the will of *George Miller*, of the one part, and the plaintiff of the other part. The plaintiff and defendant were the only executing parties.

The defendant insisted that the agreement was misdescribed in the declaration, and that the variance was not one that the judge had the power to amend, under 3 & 4 *Will.* 4, c. 42, s. 23. The judge inclined to the same opinion; but he directed a verdict to be entered for the plaintiff for the 500*l.*, reserving leave to the defendant to move to enter a nonsuit.

Talfourd, Serjt., in Easter Term last, moved accordingly, on the authority of *Readshaw* v. *Wood* (*a*), or that the judgment might be arrested, on the ground that there ought to have been an assessment of damages, under the 8 & 9 *Will.* 3, c. 11, s. 8, the stipulation for the payment of 500*l.* being in the nature of a penalty, and not liquidated damages, *Hardy* v. *Bern* (*b*), *Smith* v. *Dickenson* (*c*), and *Kemble* v. *Farren* (*d*).

Bompas, Serjt., *Erle*, Q. C., and *Dowling*, now shewed cause.—There is in fact no variance: that which is alleged to be one is, that the declaration states the agreement to be by one party, while the agreement itself purports to be by three; but the agreement being executed by the defendant (*Ancell*) alone, was in fact the agreement of himself only, and not that of himself and his co-trustees. The agreement being under seal makes no difference.—[*Coltman*, J.—Is the agreement stated truly? It is, that three should execute a lease; you state an agreement that one should do so.—*Tindal*, C. J.—Suppose they were tenants in common, all three must join.]—The plaintiff is proceeding against one alone; the language of the declaration complains only

(*a*) 4 Taunt. 13.
(*b*) 5 Term Rep. 540 n., 636.
(*c*) 3 B. & P. 630.
(*d*) 6 Bing. 141; 3 Mo. & P. 425.

of the default of the defendant; whether the other trustees were defaulters or not is immaterial. If this had been an action on a promissory note, signed by three, it would be sufficient to say that one made it. The defendant might plead in abatement, but it would be no variance.—[*Bosanquet*, J.—In that case one might pay the money; but here, a demise by *Ancell* alone would not satisfy the agreement.—*Tindal*, C. J.—Suppose this an agreement where the defendant alone covenanted that he and two others should demise, could he state it as a contract that he alone should demise?]—It is not the less a covenant that *he* will demise, because he covenants that he and others will do so. At any rate it is a case for amendment, under the Statute. The object of the Statute was to prevent advantage being taken of a slight variance.—[*Bosanquet*, J.—The object of the Statute was to prevent the defendant putting a plaintiff to the expence of getting up a case, and then obtaining a nonsuit, on the ground of variance.]—As to the reduction of damages, the sum mentioned in the agreement is expressly to be taken as liquidated damages. It is true the Courts generally look at the nature of the agreement, in order to distinguish between what is to be considered liquidated damages and what a penalty. In *Smith* v. *Dickenson*, *Kemble* v. *Farren*, *Horner* v. *Graves* (*e*), and *Davies* v. *Penton* (*f*), the language of the agreements was such that the Courts could not give effect to them, except by construing the stipulated forfeiture as a penalty, inasmuch as the forfeiture was to be incurred by the non-performance of various acts, some of which were of the essence of the contract, while others were of the most trivial description. The correct principle is laid down by *Heath*, J., in *Astley* v. *Weldon* (*g*), where his lordship says: "It may be laid down, that where articles contain covenants for the performance of several things, and then one large sum is stated at the end, to be paid upon breach of performance, that must be considered as a penalty; but that where it is agreed, that if a party do such a particular thing, such a sum shall be paid by him, then the sum stated may be treated as liquidated damages." The cases of *Crisdee* v. *Bolton* (*h*). and *Reilly* v. *Jones* (*i*), are nearly the same as this case. Here the agreement is only for the performance of a single act, namely, the execution of a lease by the defendant, and the acceptance of it by plaintiff. This, therefore, does not fall within the rule of those cases where the sum agreed on has been held to be only a penalty, by reason of there being numerous acts to be done.—[*Coltman*, J.—Suppose the defendant executed the lease, but refused to pay the attorney, could the plaintiff treat this as a breach, entitling him to the whole penalty?]—That would not be a substantial breach of the agreement.

Talfourd, Serjt., and *J. Henderson*, in support of the rule.—This case does not come within the Statute 3 & 4 *Wm.* 4, c. 42, s. 23. The variance here is not in a matter which can be said to be "not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced." It is proposed to substitute an entirely new contract between different parties. It is a misdescription, therefore, of the very essence of the contract, the two engagements being essentially different.—[*Coltman*, J.—You might have

(*e*) 7 Bing. 735; 5 M. & P. 768.
(*f*) 6 B. & C. 216, 9 D. & R. 369
(*g*) 2 B. & P. 346.
(*h*) 3 C. & P. 240.
(*i*) 1 Bing. 302; 8 Moore, 244.

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craved oyer, and demurred.]—But the defendant is not of necessity driven to that course.

On the other point they were stopped by the Court.

TINDAL, C. J.—I think it unnecessary to consider whether the variance is fatal or not, because we think that it is one that a judge had power to amend at the trial, under 3 & 4 *Wm.* 4, c. 42, s. 23, as the misdescription was "wholly immaterial to the merits," and such an amendment could "in no way prejudice the defendant in his defence to the action."

This reduces the question to the other point, viz., whether the sum, agreed between the parties to be paid on a breach of the agreement by either of them, is to be considered as a penalty, or as liquidated damages. This corresponds with the question which was raised in the case of *Horner* v. *Graves*, but not decided. Two of the cases seem to me to lay down the principle by which this case must be governed; viz., that wherever the scales are so evenly balanced that it is difficult to gather, from the precise words of the stipulation, whether parties intended a sum named in the light of liquidated damages, or of a penalty, that in such cases we must look to the whole of the agreement, and endeavour to ascertain from it the intention of the parties. The matter is here left, by the words of the stipulation, *in equilibrio*, for the parties have termed the sum to be paid both a penalty and liquidated damages. But looking to the intention of the parties, as manifested by the whole of the agreement, it seems to me clear that the sum of 500*l.* must have been meant to be a penalty, and not liquidated damages, for otherwise it would not only be payable on the defendant's refusal to grant the lease, but also on the plaintiff's refusing to pay the expences of preparing the lease; and it cannot be supposed that the parties contemplated so large a penalty for so small a default. The case appears to me to be similar in principle to *Davies* v. *Penton*, and *Kemble* v. *Farren*, and must be governed by the principles there laid down. It seems to me, therefore, that the sum in question was a penalty; and as the jury did not consider the amount of damages really sustained by the plaintiff, the cause must go down to a new trial, with proper suggestions, unless the parties can agree as to such damages.

BOSANQUET, J.—As the variance in this case did not go to the merits, it was one which the Court had power to amend. With regard to the second point, whether the 500*l.* is to be considered as a penalty or liquidated damages; the decisions are not perhaps quite reconcileable with each other. This rule, however, is established, that we must look to the agreement itself, to see if it be meant that the sum should be in the nature of liquidated damages. The strongest case for the plaintiff is *Reilly* v. *Jones*. The agreement there did not contain the words "penalty" or "penal sum." There were certainly other things to be done besides the execution of the lease; but the Court considered the sum to be in the nature of liquidated damages. One of the stipulations there was, that the expences of carrying the agreement into effect, should be paid by the parties in equal moieties; and this case, in that respect, is similar. On the other hand we have *Horner* v. *Graves*, where the point was discussed, but not determined. Then there are the cases of *Davies* v. *Penton*, and *Kemble* v. *Farren*; in the former the words were, "for the true performances of all and singular

the agreements aforesaid, each of the parties did thereby bind and oblige himself unto the other of them in the *penal sum* of 500*l.*, to be recoverable for the breach of the said agreement in any Court or Courts of Law, as and by way of *liquidated damages*;" and in the latter, "that if either of the parties should neglect, or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, each party should pay to the other the sum of 1000*l.*, to which sum it was thereby agreed, that the damages sustained by any such neglect, omission or refusal, should amount; and which sum was thereby declared by the said parties to be *liquidated and ascertained damages, and not a penalty or penal sum*, or in the nature thereof." Yet in both cases the Courts looked into the different agreements, in order to ascertain the intention of the parties. The principle established by the last case is, that where several stipulations of different degrees of value and importance are contained in an agreement, the sum which is declared to be payable on the breach of any one of them, shall not be considered as liquidated damages, but merely as a penalty. The agreement in the present case provides for the granting of a lease by the defendant to the plaintiff; and it goes on to state the nature of the covenants to be contained in it. It may be that the intentio of the parties was to enforce the grant or acceptance of the lease; but it goes on to provide for the expences of making the lease, which are to be borne by the plaintiff, and a penalty would be incurred by refusing to pay those expences; but it never could have been intended that that penalty should amount to the whole sum mentioned in the agreement.

COLTMAN, J.—I am of the same opinion. There is not much difficulty as to the first point, as I think it is clear the Judge at the trial had power to amend the declaration. As to the second point, I think the rule by which agreements of this nature are to be construed, is definite and intelligible. In order to constitute a right to recover liquidated damages, there must be an express appropriation of the sum to distinct acts. It was probably the intention of the parties in this case, that the sum of 500*l.* was to be considered as stipulated damages on the failure of either to execute the lease. But we must look to the legal effect of the words used; and here the sum named is equally applicable to the failure to pay the expences of making the lease. Upon the whole, therefore, I think the sum in question should be considered as a penalty.

ERSKINE, J.—I am of the same opinion. There are two cases on this subject in this Court much opposed to each other; *Reilly* v. *Jones*, and *Kemble* v. *Farren*. In the first of these the case turned on the absence of the word *penalty*; and it was held, that the term *liquidated damages*, being the only one used in the agreement, the sum in question must be so considered; but in *Kemble* v. *Farren*, the words used were very strong, designating the sum to be *liquidated damages* only, and not a *penalty*, or in *the nature of it*; but it was, nevertheless, held to be a penalty, inasmuch as it would attach not only to the substantial breach, but also to some stipulations of very small consequence. Here the language of the agreement is different to either of those two cases; but it closely resembles that in *Davies* v. *Penton*. The words "*penal sum*" are there used. This brings us to

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the question, What was the intention of the parties? I think the rule laid down by *Heath*, J., in *Astley* v. *Weldon*, is the true one. Taking this rule as a guide to the construction of this agreement, we cannot but see that the forfeiture attaches to the failure to peform several things of different degrees of consequence; and it could not, therefore, have been intended as a fixed penalty. On the one side, there was but a single act to be done namely, the execution of the lease by the defendant; but, on the other hand, the plaintiff was, beside the execution, to pay the expences of preparing the agreement, lease and counterpart. Had he refused to pay these expences, it would have been a breach of the agreement; and could it be said, that the full penalty was incurred by this breach? It seems to me, that the intention of the parties was, that the sum should be taken as security for the damages incurred.

The parties agreed that the verdict should remain, the damages being reduced to 1*s*.

Rule absolute accordingly, without costs on either side.

May 1.

RENDALL *v.* HAYWARD.

A new trial refused, in an action of slander, where the jury had given only 20*s*. damages.

CASE for slander, imputing theft to the plaintiff. At the trial it was proved, that the words were spoken under circumstances which indicated actual malice on the part of the defendant; the jury, however, found a verdict for 20*s*. only.

Clarkson moved for a new trial, on the ground that the verdict was perverse and disproportionate to the injury proved to have been sustained; and urged that by this verdict the plaintiff would be deprived of costs, as the judge had no power to certify.

TINDAL, C. J.—I think that there is not sufficient ground to send the case down for trial again. The damages were exclusively for the jury. Perhaps a fuller measure of justice might have been awarded if they had given higher damages; but it is not usual for the Court to grant a new trial on the ground of the smallness of damages, except there has been a mistake of law, or some evident miscalculation by the jury.

BOSANQUET, J.—I am of the same opinion. New trials are never granted in cases where damages are excessive, unless the excess is extravagant. I never heard of a new trial being granted on the ground of the smallness of damages. The general rule must be adhered to.

Rule refused (*a*).

(*a*) See *Hayward* v. *Newton*, 2 Stra. 940, acc.

PETCH *v.* FOUNTAIN.

Common Pleas.

May 2.

An action for a quarter's rent was brought on 27th June, 1838; the defendant pleaded a set-off of 129*l.*, which, by the terms of an agreement between the parties, was not payable till 1st August. An action of slander was also brought by plaintiff against defendant. Both causes, and all matters in difference, *including the claim under which the set-off was pleaded*, were referred. In November an award was made, finding the quarter's rent for the plaintiff in the first action, and negativing the set-off. The arbitrator also found that there was no cause of action for slander, and awarded 129*l.* to be paid to the defendant, as a matter in difference:—*Held*, that the arbitrator had not exceeded his authority, and that the defendant's claim to a set-off came within the terms of the order of reference.

THE plaintiff and defendant, who were both school-mistresses, entered into an agreement, by which the defendant took from the plaintiff a house, from Lady-day, 1838, at sixty guineas a-year, payable quarterly; and the plaintiff agreed to pay the defendant for the board of twenty-three young ladies, by instalments, payable quarterly; the first payment to be made on the 1st of August. The plaintiff commenced an action for the first quarter's rent (15*l.* 15*s.*) on its becoming due at *Midsummer*. The defendant pleaded a set-off for the sum of 129*l.*, claimed to be due in respect of the board of the young ladies. Another action, for slander, had been commenced by the plaintiff against the defendant, on the 27th of July. Both actions, and all matters in difference, including the claim of the defendant in her set-off in the first action, were referred. The first meeting before the arbitrator was in November; and he awarded, that a verdict should be entered for the plaintiff in the first action for 15*l.* 15*s.*, and also, in respect of the set-off, that there was no cause of action for slander; and that on the 1st of August, the sum of 129*l.* was due to the defendant, which sum he awarded that the plaintiff should pay to the defendant.

Wilde, Serjt., had obtained a rule, calling on the defendant to shew cause why the award should not be set aside as to that part which directed that the 129*l.*, due on the 1st of August, should be paid to the defendant, on the ground that the instalment becoming due subsequent to the order of reference, the arbitrator had no authority to make this order.

Bingham shewed cause, and contended that the defendant's claim of set-off was clearly a matter in difference, and expressly within the terms of the order of reference.

Wilde, Serjt., in support of his rule, argued that, admitting the sum in question was a matter in difference, it was by no means clear that it was a subject of set-off; for it was not due at the time when it was pleaded to the action.

TINDAL, C. J.—This is merely a question as to the intention of the parties. If it was only intended that the arbitrator should consider whether the set-off was a proper answer to the action, there would have been no necessity to have specially included it in the order of reference. It is certainly within the meaning of the word *claim*, which is clearly a part of the reference. The rule must be discharged.

BOSANQUET, J.—I am of the same opinion. The arbitrator was to consider all claims; and if the set-off was in the nature of a claim, although it might not have been an answer to the action, he was bound to decide upon it.

COLTMAN and ERSKINE, Js., concurred.

Rule discharged.

Common Pleas.

May 2.

The defendant was arrested by one *S.*, a sheriff's officer, who at the time had a warrant from the late sheriff, but none from the present. There was at the time another writ in the sheriff's office against the defendant, at the suit of another party; and one *N.*, another officer, had the warrant upon this writ in his possession. This warrant was delivered by *N.* to *S.*, and the under-sheriff altered the warrant, by substituting the name of *S.* for that of *N.*, as the officer by whom it was to be executed:—*Held*, that the defendant was not in the lawful custody of *S.*, and that the sheriff having, by the alteration of the warrant, become a party to the illegal act of the officer, the defendant was not liable to be detained upon other writs then in the sheriff's hands.

Held, also, that the defendant did not, by suing out a *habeas corpus* to remove himself into the custody of the warden of the Fleet, admit himself to be in the legal custody of the sheriff.

PEARSON and another *v.* YEWENS.

WILDE, Serjt., on a former day in this term, had obtained a rule to shew cause why the defendant should not be discharged out of custody as to this action, on the ground that he was arrested without any warrant; and also calling upon one *Sloman*, a sheriff's officer, by whom the arrest had been effected, to shew cause why he should not pay the costs of the application.

Cause was shewn by *Gunning*, for the plaintiffs; and *Hoggins*, for *Sloman*; and

Wilde, Serjt., and *Humfrey*, were heard in support of the rule.—It is unnecessary to repeat the facts and arguments, as they are so fully stated in the judgment of the Court, which, after time taken to consider, was now delivered by

TINDAL, C. J.—This was an application by the defendant to be discharged out of custody as to this action, in which he was detained under colour of a writ of *capias ad satisfaciendum*; upon which, at the time of the arrest, no warrant had been issued. By the affidavits it appeared, that the defendant had been arrested in an action, at the suit of *Isabella Maclaren*, by one *Sloman*, who had a warrant from the late sheriff of Middlesex to arrest the defendant, but had no warrant from the present sheriff; and the defendant was, thereupon, forcibly taken to *Sloman's* lock-up-house, in Chancery-lane. At that time there were several writs in the Sheriff's Office against the defendant; and, during the time the defendant was in the custody of *Sloman*, a warrant, which had been issued on one of them, at the suit of *James* and *Robert Robinson*, and which was in the possession of an officer of the name of *Nathan*, to arrest the defendant, was, at the request of *Sloman*, delivered to him by *Nathan*, an indorsement having been made thereon by *Nathan* in these terms: "Not executed by me. *L. J. Nathan*, 3d of April, 1839;" and the warrant was then altered by the under-sheriff, by inserting in it the name of *Sloman*, as one of the officers to execute it.

An application was afterwards made by the defendant, to a judge at chambers, to be discharged out of custody. The judge declined to make any order; and thereupon the defendant sued out a writ of habeas corpus, in order to his being removed to the custody of the warden of the Fleet. To this writ the sheriff returned, that he had arrested the defendant at the suit of *James* and *Robert Robinson*, and that he was detained in custody at the suit of the plaintiffs in this action, and by three other plaintiffs in three other actions. A rule *nisi* was obtained as against the plaintiff in this action, and *Sloman*, the sheriff's officer, for the discharge of the defendant. On shewing cause against this rule, it was contended that *Sloman*, in making the original caption, having no warrant from the sheriff, was to be looked on as a mere stranger; and that the wrongful

act of a stranger, in imprisoning the defendant, could not operate to prevent the sheriff from detaining the defendant by virtue of the writs in the office, which attached as soon as the party was brought into the custody of the sheriff, though wrongfully brought, provided the sheriff was no party to the wrong; for which the cases of *Howson* v. *Walker* (*a*), and *Arundel* v. *Chitty* (*b*), were cited. But it appears to us, that if *Sloman* is to be considered as a mere stranger in making the original caption, the defendant cannot be considered as having been in the custody of the sheriff by being taken to *Sloman's* lock-up-house, for the lock-up-house of *Sloman* is not the prison of the sheriff; and the earliest period at which any writs in the sheriff's office could in that case attach, would be when the name of *Sloman* was inserted in the warrant. We cannot, however, consider the defendant as being lawfully in the custody of *Sloman*, in consequence of the insertion of his name in the warrant originally issued to *Nathan*. It must, we think, be considered as a collusive act, intended to give a false colour of legality to the original caption of the defendant by *Sloman*; and as having, in effect, made the sheriff a party to the original illegality committed by *Sloman*, so far at least as to prevent the detainers from attaching. If the sheriff had issued a warrant to *Sloman*, in the action at the suit of *Maclaren*, after the original caption, he would thereby clearly have made himself a party to the original wrongful caption; and we cannot think that he is less a wrong doer, in consequence of his having proceeded, by a less direct course, to effect that which appears intended to produce the same end; and the case, therefore, appears to us to fall within the principle of *Barratt* v. *Price* (*c*). It was suggested, in the course of the argument, that the defendant, by suing out the writ of *habeas corpus*, and removing himself into the custody of the warden of the Fleet, had admitted himself to be in the legal custody of the sheriff; and that by consequence the writs in the office had attached. But it does not appear to us that this admission ought to prejudice the defendant. A warrant having been issued to *Sloman* to arrest him, *the fact* could not be controverted that he was in the custody of the sheriff; but it was open to the defendant, before his removal, to controvert the *legality* of such custody; and we see nothing in the form of the writ of habeas corpus, that should estop him from still controverting it. We therefore think that the rule should be made

Absolute.

(*a*) 2 W. Black. 823.
(*b*) 1 D. P. C. 499; *Davies* v. *Chippendale*, 2 B. & P. 282; *Barclay* v. *Faber*, 2 B. & A. 743, were also cited in the argument upon this point.
(*c*) 2 M. & Scott, 634; 9 Bing. 566.

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May 7.

The Court cannot, without the consent of parties, order issues in fact to be struck out, with liberty to restore them after the decision of a Court of Error on issues in law.

CARDEN *v.* The GENERAL CEMETERY COMPANY.

JUDGMENT having been given in this case for the plaintiff on a demurrer to two of the pleas (*a*), the defendants had brought error, whereupon

R. V. Richards, on behalf of the defendants, had obtained a rule *nisi* to strike out the issues in fact, with liberty to restore them after judgment in error.

Wilde, Serjt., and *W. H. Watson*, shewed cause. In *Beckham* v. *Knight* (*b*), a somewhat similar application was made to this Court, but they declined to interfere. In that case the application was made by the plaintiff in his own delay; here it is made by the defendants, which affords a stronger reason why the Court should refuse the application. In *Beckham* v. *Knight*, that was done by consent, which is now sought to be obtained against the plaintiff *in invitum*. In *Burdett* v. *Coleman* (*c*), which was cited in *Beckham* v. *Knight*, there were three trials arising out of the same act: one judgment would, therefore, over-ride them all. At present the plaintiff has the judgment of the Court, and if it is affirmed, he must still go down to try the issues in fact; if the defendants get a verdict, they will not go on in error.

R. V. Richards, in reply, urged that it would be advantageous to both parties to avoid the expence of trying the issues in fact, as the real question would be decided between them upon the demurrer.

PER CURIAM.—We have no power to interfere, however anxious we may be to prevent expence. It must be a matter of arrangement between the parties.

Rule discharged.

(*a*) *Ante*, vol. 1, 503; 5 New Ca. 253; 7 Scott, 97; 7 D. P. C. 275; 3 Jer. 24.

April 15.

The Court will not postpone the trial of issues in fact, until after the decision of a Court of Error upon issues in law upon the same record.

(*b*) BECKHAM *v.* KNIGHT & DRAKE. In this case, the Court had given judgment on demurrer in favour of the defendant *Drake*(a), whereupon the plaintiff had brought a writ of error.

Stammers, in the last Term, had obtained a rule nisi, on behalf of the plaintiff, to stay the trial of the issues in fact until after the decision of the Court of Error should be pronounced. He cited *Burdett* v. *Coleman* (b).

E. V. Wilkiams (for the defendant *Drake*) shewed cause, and cited 2 *Wms. Saund.* 100, *Metcalfe's Case* (c), *Fitzwilliams* v. *Coply* (d), *Samuel* v. *Judin* (e), *Vin.* Abr. "Error," (M).

Wilde, Serjt., and *Stammers* were heard in support of the rule; but the Court intimating that they were clearly of opinion that they had no power to make such an order, it was ultimately arranged between the parties, that the issues in fact should be struck out, with liberty to either party to restore them after the judgment in error should have been pronounced.

(*c*) 13 East, 27.

(a) *Ante*, vol. 1, 71; 4 New Ca. 243; 5 Scott, 619.
(b) 13 East, 27.
(c) 11 Rep. 38, a.
(d) Dyer, 291 b, pl. 68.
(d) 6 East, 333.

MANIFOLD and another *v.* MORRIS, Assignee of H. RIGMAIDEN, a Bankrupt.

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April 28.

Certain premises, with the licences attached to them, were mortgaged to the plaintiffs, who afterwards sold the premises, to discharge their mortgage: the licences at this time were suspended. The assignee of the mortgagor, who had become bankrupt, obtained a new licence, which was sold, with the good-will, for a sum of money, to a third party: *Held*, that this sum was not money received to the use of the plaintiffs.

Query, whether such licences can be made the subject of a sale.

ASSUMPSIT for wine licences sold and delivered, for money had and received, and on an account stated.

The case was tried before *Coleridge*, J., at the Spring Assizes at Liverpool, in 1838. The following facts were proved:—

On the 24th February, 1835, *H. Rigmaiden*, a publican, and wine and spirit merchant, mortgaged the premises in which he carried on his business, and all licences for selling wines and spirits on the premises to the plaintiffs, for 3,900*l.*, with a power of sale on default of payment. On the 26th of the same month, he mortgaged the same premises a second time to *J. Holder*, for 1,350*l.*, with a like power of sale. On the 27th of the same month, he made a third mortgage of the same premises to his brother, *J. Rigmaiden*, for 1,330*l.* On the 26th February, 1836, he became a bankrupt, and the defendant was appointed his assignee. On the 7th April following, the premises were sold by the plaintiffs, under their power of sale, to *E. Rigmaiden*, for 5,520*l.*, but the licences were reserved to be taken at a valuation by the purchasers of the premises. They were at this time suspended. From the 5,520*l.* the two first mortgagees were paid off, and the balance of 207*l.* was paid to *J. Rigmaiden*, the third mortgagee. On the 17th May, 1836, the defendant, as assignee of the bankrupt, sold to *E. Rigmaiden* the good-will of the business, the licences, liquors and trade fixtures for 150*l.*; and, the former licence having been forfeited, obtained a new one for him. The plaintiffs, as first mortgagees, now sought to recover the sum for which the licences were sold. The learned judge directed a nonsuit, on the ground that the licences could not be the subject of a sale, and that, at all events, the licence, for which the sum in question was paid, was not that conveyed to the plaintiff, and which had been suspended, but a new one.

Cresswell, Q. C., had obtained a rule *nisi* to set aside the nonsuit, on the ground that the licences were a part of the mortgage security, and that being sold, the plaintiffs were entitled to the money they produced.

R. Alexander, Q. C., and *Crompton*, shewed cause, and referred to the Statute 9 *Geo.* 4, c. 61, secs. 1, 4, 9, 11, 14, and *Ex parte Reid* (*a*); and

W. H. Watson supported the rule.

TINDAL, C. J.—The sum sought to be recovered in this action cannot, in my opinion, be considered as money had and received by the defendant to the use of the plaintiffs. I am inclined to doubt whether such licences can be made the subject of a sale; but independently of this, I am of opinion that the plaintiffs are not entitled to recover, upon two grounds; first, the licence

(*a*) 1 Deacon & Chitty, 250.

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in question is not the one conveyed to the plaintiffs, that one having been suspended, and a new one having been obtained by the defendant; secondly, all the interest of the plaintiffs in the property ceased when the premises were sold by them to pay off their mortgage, and were conveyed to a third person; they were not then in a situation to apply for another licence. The rule must be discharged.

BOSANQUET, COLTMAN, and ERSKINE, Js., concurred.

Rule discharged.

May 1.

STERT and another, Executrix and Executor of J. BURN, deceased, *v.* PLATEL.

Devise to *A. H.* for life; remainder to *R. H.* for life, and to his first and other sons successively in tail; remainder, in default of issue, to *A. D. H.* for life, with remainder to his first and other sons successively in tail; and, in default of such issue, "to such person bearing the surname of *H.* as *shall be* the male relation nearest in blood to *R. H.*, and his heirs for ever:"—*Held*, that the ultimate remainder in fee vested in interest at the death of the testatrix, agreeably to the rule that a remainder shall not be construed as contingent if it can be construed as vested.

ASSUMPSIT by the executrix and executor of *Jane Burn*, deceased, for the use and occupation of two messuages, &c., at Peterborough. Plea, the general issue. A verdict was found for the plaintiffs, subject to the opinion of the Court, on the following *Case*:—

Eleanor Hake being seized in fee of the messuages, for the use and occupation of which this action was brought, on the 1st of May, 1784, by her will duly executed for passing real estates, devised the messuages to *Abraham Hake* for life; remainder to trustees to preserve contingent remainders; remainder to *Richard Hake*, son of *Abraham*, for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said *Richard* successively in tail male; remainder, in default of such issue, to *Abraham David Hake*, another son of the said *Abraham*, for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of *Abraham David* successively in tail male, "and in default of such issue, unto such person, bearing the surname of *Hake*, as *shall be* the male relation nearest in blood to the said *Richard Hake*, and to his heirs for ever."

The testatrix died in 1784, and *Abraham Hake* entered into possession of the premises. He died so possessed of them in 1792, leaving the said *Richard* and *Abraham David*, his two sons, him surviving; and on his death, the premises came into the possession of the said *Richard*, who died in 1813, without having had issue. *Abraham David* then entered into possession of the premises, and continued so in possession, or in the receipt of the rents and profits thereof, until his death.

Several years previous to the death of *Abraham David*, the defendant became his tenant of the premises, and continued to be such tenant up to, and at the time of, the death of *Abraham David*, and paid him rent for the same as such tenant. After the death of *Abraham David*, the defendant continued to occupy the premises up to, and at the time, this action was brought, and the sum of 120*l.* was then due from him for the rent thereof.

In the year 1826, *Abraham David*, so then being in possession or in the receipt of the rents and profits of the premises, by his will duly executed for passing real estates, devised the same to the said *Jane Burn* in fee. *Abra-*

ham David died on the 28th September, 1833, without having had issue, leaving the said *Jane* him surviving; and the defendant having refused to pay the rent which had accrued due from him for the occupation of the premises, after the death of *Abraham David*, to *Jane Burn*, in her life-time, or to the plaintiffs, executrix and executor, or to either of them, since her death, this action was brought.

The question for the opinion of the Court was, whether the premises passed to *Jane Burn* by the will of *Abraham David*.

N. R. Clarke for the plaintiffs.—The question is, at what period the ultimate remainder in fee vested. If it vested *prior to the death* of *Abraham David Hake*, it would pass by his will to the testatrix of the plaintiffs, who would then be entitled to recover. If it did not vest *until his death*, the plaintiffs have no title. The plaintiffs contend that the remainder vested at the time of the death of *Eleanor Hake*, the original testatrix. It is an established rule, that a remainder is never to be construed as contingent when it can be construed as vested, unless the former clearly appears to be the testator's intention, *Ivie* v. *Legge* (*a*); *per Bayley*, J., in *Doe*, d. *Cholmondeley* v. *Maxey* (*b*); *Driver*, d. *Frank* v. *Frank* (*c*); *Doe*, d. *Pilkington* v. *Spratt* (*d*); *Cholmondeley* v. *Clinton* (*e*).

It will be said that the words of the will ("such person as *shall be* the male relation nearest in blood to *R. H.*") are prospective, and do not contemplate the male relation nearest in blood at the death of the testatrix; but the words "shall be" may refer to that period, and there is nothing else in the will to point to any time more remote; *Doe*, d. *Garner* v. *Lawson* (*f*), *Doe*, d. *Cholmondeley* v. *Maxey* (*g*), *Spinks* v. *Lewis* (*h*), *Holloway* v. *Holloway* (*i*), *Pearce* v. *Vincent* (*j*).

Ede for the defendant.—This is a contingent remainder. It is said that the remainder vested at the death of the testatrix, and it would be so by the general effect of the rule; but the rule is not inflexible, and must depend on the intention which is apparent in the whole of the will taken together. It is possible that *Abraham* may have left a son elder than *Abraham David*.—[*Tindal*, C. J.—We cannot intend anything that is not in the case.]

By the expression "to the person who shall be nearest in blood," was meant some person other than *Abraham David*, his brother and father, who were specifically named. That the rule is not inflexible is shewn by the authority of *Perrin* v. *Drake* (*k*), *Cholmondeley* v. *Clinton*, *Bon* v. *Smith* (*l*). —[*Erskine*, J.—*Jobson's Case*, *Cro. Eliz.* 576, is against *Bon* v. *Smith*.]—

(*a*) 3 T. R. 488. n.
(*b*) 12 East, 604.
(*c*) 3 M. & S. 29; S. C. aff. in Cam. Scac.; 6 Price, 41; 2 Moo. 519; 8 Taunt. 468.
(*d*) 5 B. & Adol. 731; 2 N. & M. 524.
(*e*) 2 Mer. 171, 3, 344, 353; 19 Ves. 261; 2 Ves. & Bea. 113; Coop. 80; 2 Jac. & Walker, 1.
(*f*) 3 East, 278.
(*g*) 12 East, 589.
(*h*) 3 Bro. C. C. 355.
(*i*) 5 Ves. 399.
(*j*) 1 C. & M. 598; 1 Hodg. 358; 2 New Cases, 328; 2 Scott, 347. It is an established rule that words which apparently sound in future, shall nevertheless be construed to give a present interest, if the intent, as gathered from the context of the will, so requires; see *Boraston's Case*, 3 Rep. 19; *Bromfield* v. *Crowder*, 1 N. R. 313; *Doe*, d. *Rwake* v. *Nowell*, 1 M. & S. 327; 5 Dow. 202.
(*k*) Hargrave's Law Tracts, p. 489.
(*l*) Cro. Eliz. 532.

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Lord *Hardwicke*, in *Pyot* v. *Pyot* (*m*), said that he was not quite satisfied with the resolution in *Jobson's Case*, and that he thought it a very odd one. *Marsh* v. *Marsh* (*n*), *Jones* v. *Colbeck* (*o*), *Miller* v. *Eaton* (*p*), *Phillips* v. *Deakin* (*q*), *Bird* v. *Wood* (*r*), *Briden* v. *Hewlett* (*s*), *Butler* v. *Bushnell* (*t*), are to the same effect. The present case is distinguishable from those cited on the other side.

The object of the Court always is to ascertain the intention of the testator; and when that is once done, the Court will not put a different construction upon it, *Leigh* v. *Leigh* (*u*). The other side call upon the Court to infer that the testatrix intended to give the remainder in fee to parties for whom she had already provided in other parts of her will.

N. R. Clarke, in reply.—It may be admitted that the rule is not inflexible; but unless there be a clearly expressed intention to countervail the rule, it must prevail, as was laid down by *Dampier*, J., in *Driver* v. *Frank*. It is not uncommon that a particular estate should be given to a person to whom the remainder in fee is afterwards devised, *per Grose*, J., in *Doe*, d. *Garner* v. *Lawson*, *Masters* v. *Hooper* (*v*). *O'Keefe* v. *Jones* (*w*), and *Pearce* v. *Vincent*, are to the same effect. Except *Bon* v. *Smith*, all the cases cited on the other side relate either to personal property, or they are cases in which the interest is given with an executory devise over, and the rule does not apply to such cases.

TINDAL, C. J.—The question is, whether there is a general rule that estates, when limited over in general terms like the present, shall vest at the death of the testator. It is contended, on the part of the defendant, that this is an open question, to be decided by the intention of the testator; but the cases relied on by the defendant relate to personal property only, and, therefore, I think the general rule must prevail in this case. This I take to be that the remainder shall vest at the earliest time. This rule is laid down in *Doe* v. *Lawson* and *Doe* v. *Maxey*; and as there is nothing in the will sufficient to indicate an intention contrary to it, our judgment must be for the plaintiffs. The words which it is argued point out such an intention are, "in default of such issue to such persons as shall be the nearest in blood." Similar words were used in *Doe* v. *Lawson*; but the Court decided that they did not operate to postpone a remainder vesting at the death of a testator; and *Doe* v. *Maxey* is to the same effect. We think, therefore, that it is best to adhere to the general rule, and our judgment will be for the plaintiffs.

BOSANQUET, J.—*The general rule*, with reference to real property, *is, that a remainder is not to be construed as contingent if it can be construed as vested.* But it is said that this rule must yield to the clear expression of the testator's intention. Great stress is laid on the word "*shall*," but the word "*then*" is not coupled with it; and taking the general rule as the founda-

(*m*) 1 Ves. sen. 335.
(*n*) 1 Bro C. C. 293.
(*o*) 8 Ves. 38.
(*p*) Coop. C. C. 272.
(*q*) 1 M. & S. 744.
(*r*) 2 Sim. & Stu. 400.
(*s*) 2 Mylne & K. 90.
(*t*) 3 Mylne & K. 232.
(*u*) 15 Ves. 102.
(*v*) 4 Bro. C. C. 207.
(*w*) 13 Ves. 413.

tion, we are bound to see that the exception is clearly expressed. The word "*shall*" certainly looks to the future; but a will is always made with reference to the future. If a person satisfies the words of the will, the general rule ought to prevail. The cases cited for the defendant relate to personal property, and do not apply to a rule laid down with reference to realty.

COLTMAN and ERSKINE, Js., concurred.

Judgment for the plaintiffs.

DAVIES *v.* CHAPMAN.

May 3.

DEBT against the marshal of the Marshalsea, for voluntarily permitting the escape of *J. Noel*, charged in execution at the suit of the plaintiff.

In an action against the marshal for an escape, the plea stated that the prisoner voluntarily returned into custody before the commencement of the action, but did not aver that he returned before the marshal had any notice of his escape:—*Held*, bad.

Plea, that after the commitment of *Noel* to the custody of the defendant in execution, to wit, on, &c., *Noel* wrongly, privily, and without the knowledge, permission or consent of defendant, escaped from and out of the custody of the defendant, as such marshal, to places to the defendant unknown: that *Noel* afterwards, and before the commencement of this suit, to wit, on, &c., voluntarily, and of his own accord, and without the knowledge of the defendant, returned back again into the custody of the defendant, as marshal, and the defendant did thereupon then keep and detain, and always from thence hitherto hath kept and detained, and before and at the time of the commencement of this suit kept and detained, and still keeps and detains, the said *Noel* in the custody of him the defendant, as such marshal, in execution, at the suit of the plaintiff, under and by virtue of the commitment in execution. Verification.

Special demurrer, that the plea did not state that the defendant had no knowledge, notice or information of the escape between the time when it took place, and when *Noel* returned back again into the custody of the defendant, as marshal; nor did the plea state any excuse or discharge for the defendant's not having, during that period, made any pursuit for the re-taking of *Noel*, or any excuse for his breach of duty during that period.

Joinder in demurrer.

R. V. Richards, in support of the demurrer.—The marshal was bound to endeavour to re-take the prisoner. His duty is not discharged by a mere voluntary return of the prisoner before action brought: such return, it is true, is equivalent to a re-taking upon fresh pursuit, provided the gaoler had not notice of the prisoner's escape previously to his return. In *Bonafous* v. *Walker* (*a*), and *Griffiths* v. *Eyles* (*b*), the plea stated the absence of such notice. If the plea in this case were sufficient, the prisoner might, with the knowledge of the marshal, leave the prison every night after the offices of the Court were closed, so that he returned in the morning before the offices were open. He also referred to 3 *Chitty* on Pleading, 6th ed., 844—5, and *Rigeway's Case* (*c*).

(*a*) 2 T. R. 126.
(*b*) 1 B. & P. 413.
(*c*) 3 Rep. 52, a.

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Hoggins, contrà, cited *Chambers* v. *Gambier* (*d*), and *Chambers* v. *Jones* (*e*); but the Court intimating a strong opinion against him, he obtained Leave to amend.

(*d*) Comyns, 544.

(*e*) 11 East, 406.

May 4.

WILLIS *v.* ALLEN.

The bankruptcy of a sole plaintiff, after the cause of action accrued, but before suit, is an issuable plea.

TO *assumpsit* for goods sold and delivered, the defendant, being under terms to plead issuably, pleaded, first, the general issue; and secondly, that after the cause of action accrued, and before the commencement of the action, the plaintiff was a bankrupt. Judgment was signed, on the ground that the second plea was not issuable.

Hayes obtained a rule nisi to set aside the judgment as irregular.

Wilde, Serjt., shewed cause, on an affidavit that the plaintiff had assigned the debt before his bankruptcy; that it was not included in his schedule; that the person to whom it was assigned was dead, and the plaintiff was suing as his executor. *Staples* v. *Holdsworth* (*a*), and *Wetenhall* v. *Graham* (*b*), are authorities to shew that this is not an issuable plea; and the defendant being under terms to plead issuably, and having pleaded one plea that is not issuable, the plaintiff is entitled to sign judgment, *Waterfall* v. *Glode* (*c*), *Serle* v. *Bradshaw* (*d*).

Hayes, in support of his rule.—In *Staples* v. *Holdsworth*, the plea was of the bankruptcy of *one* of *two* plaintiffs, *after* the commencement of the action. Here the sole plaintiff has become bankrupt *before* the action commenced, and, therefore, the cause of action passed to his assignee. In *Wetenhall* v. *Graham*, the cause of action being trespass it did not pass to the assignee.

TINDAL, C. J.—This case is certainly distinguishable from *Staples* v. *Holdsworth*, upon the grounds stated at the bar; and I do not think we can say this is not an issuable plea.

BOSANQUET, COLTMAN, and ERSKINE, Js., concurred.

Rule absolute.

(*a*) *Ante*, Vol. 1, 275; 4 New Cases, 144; 5 Scott, 432.

(*b*) *Ante*, vol. 1, 286; 4 New Cases, 714; 6 Scott, 603.

(*c*) 3 T. R. 305.

(*d*) 2 C. & M. 148; 4 Tyr. 69; 2 D. P. C. 289.

OSBORNE *v.* PECHELL and others.
HEARSAY *v.* SAME.

Common Pleas.
May 6.

In an action by a pauper against certain magistrates for turning him out of premises claimed by him, the Court refused to stay proceedings until security was given for costs by a third party, who had instigated the action, inasmuch as it did not appear that the action would not have been brought but for his instigation.

TRESPAS against magistrates for granting warrants to turn the plaintiffs out of the possession of certain cottages, which were used as a poor house, and against the constables who executed them.

In 1807, the plaintiffs were placed by the overseers of Amersham South in the cottages in question. In 1836, the premises were sold by order of the Poor Law Commissioners; but the plaintiffs refusing to quit, the magistrates had issued warrants to deliver possession to the overseers, under the 59 *Geo.* 3, c. 12, s. 24 (*a*). A Mr. *Wood* had taken a very active part in endeavouring to support the claim of the plaintiffs; and in a letter to the parish officers, he said: "I will not shrink from the step I may have taken in the affair (he had previously petitioned the House of Lords on the subject); as long as trial by jury exists, I fear no one; * * * the cause I have considered a public, not a private one."

Wilde, Serjt., upon affidavits stating these facts, had obtained a rule, calling on the plaintiffs and *Wood* to shew cause why the proceedings should

(*a*) Which, after reciting that difficulties had frequently arisen, and considerable expences had sometimes been incurred, by reason of the refusal of persons who had been permitted to occupy, and who had intruded themselves into parish or town houses, or other tenements or dwellings built or provided for the habitation of the poor, or otherwise belonging to such parishes, to deliver up the possession of such houses, tenements or dwellings, when thereto required, enacts, "that, if any person who shall have been permitted to occupy any parish or town house, or any other tenement or dwelling belonging to or provided by or at the charge of any parish, for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into any such house, tenement or dwelling, or into any house, tenement or hereditament belonging to such parish, shall refuse or neglect to quit the same, and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish, within one month after notice and demand in writing for that purpose, signed by such churchwardens and overseers, or the major part of them, shall have been delivered to the person in possession, or, in his or her absence, affixed on some notorious part of the premises, it shall be lawful for any two of His Majesty's justices of the peace, upon complaint to them made by one or more of the churchwardens and overseers of the poor of the parish in which any such house, tenement or dwelling shall be situated, to issue their summons to the person against whom such complaint shall be made, to appear before such justices at a time and place to be appointed by them, and to cause a summons to be delivered to the party against whom the complaint shall be made, or, in his or her absence, to be affixed on the premises, seven days at the least before the time for hearing such complaint; and such justices are hereby empowered and required, upon the appearance of the defendant, or upon proof on oath that such summons hath been delivered or affixed, as is hereby directed, to proceed to hear and determine the matter of such complaint, and if they shall find and adjudge the same to be true, then, by warrant under their hands and seals, to cause possession of the premises in question to be delivered to the churchwardens and overseers of the poor of the parish, or to some of them."

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not be stayed until security for costs be given, either by them or by *Wood*, upon the authority of *Tennant* v. *Brown* (*b*).

Erle, Q. C., and *Knowles*, now shewed cause, on affidavits that *Wood* had no pecuniary interest in the action; that the plaintiffs were proceeding to support a *bonâ fide* claim to the premises; and that they had had no communication with *Wood* till after action commenced.—The poverty of the plaintiff is no ground for requiring security for costs, *M'Cullock* v. *Robinson* (*c*), *Morgan* v. *Evans* (*d*). In *Doe*, d. *Selby* v. *Alston* (*e*), *Buller*, J., lays down the rule as to the instances in which the Court will interfere to compel the plaintiff to give security for costs; viz., first, in the case of an infant sueing (where the prochein amy, or guardian, or attorney, must give securty;) secondly, where the plaintiff resides abroad; and thirdly, where there has been a former ejectment. In *Tennant* v. *Brown*, the landlord, who was the attorney in the cause, had a pecuniary interest in it.

Wilde, Serjt., in support of his rule.—Although *Wood* has no pecuniary interest in the cause, if it is in fact his action, which it clearly is, he must give security.

TINDAL, C. J.—We are not called on to decide whether the cottages are the property of the plaintiffs, or of the parish officers; we may form some opinion; but still the plaintiff has a right to go before a jury. The real question then is, whether the actions are the plaintiffs' or Mr. *Wood's*. If they are brought solely at the instigation of the latter, he should find some securty for costs; for the case would be within the principle of *Tennant* v. *Brown*; where it was held, that if a party, having a right to try, puts forward a servant instead of himself, the Court would make the real party liable for costs; but on the present occasion, it is not proved to my satisfaction that the action would not have been brought without the interference of Mr. *Wood*. I think the rule should be discharged.

BOSANQUET, COLTMAN, and ERSKINE, Js., concurred.

Rule discharged, without costs, as to *Wood*, and as to the others, the costs to be costs in the cause (*f*).

(*b*) 5 B. & C. 208.
(*c*) 2 N. R. 352.
(*d*) 7 Moore, 344.
(*e*) 1 T. R. 491.
(*f*) See *Doe*, d. *Carr* v. *Jordan*, 4 Scott, 370; *Rex* v. *Wakelin*, 1 B. & Ad. 50.

May 7.

SILVERSIDE *v.* TAPPEN.

Where a declaration is filed, it is not necessary to indorse the time for pleading.

HEATON had obtained a rule, calling on the plaintiff to shew cause why the declaration, filed in this case, should not be set aside for irregularity, the time for pleading not being indorsed on it; he cited *Tidd's* Practice, 9th ed., 473, *Archbold's* Practice, 6th ed., 299. *Heath* v. *Rose* (*a*).

(*a*) 2 N. R. 223.

Peteredorff shewed cause.—*Heath* v. *Rose* does not apply. The application there was to set aside a judgment signed for want of a plea. The want of a notice is not a ground for setting aside a declaration, *Anonymous* (*b*).

TINDAL, C. J.—In *Heath* v. *Rose*, the declaration was *delivered*. Where a declaration is *filed*, it is not necessary to indorse on it the time for pleading. Rule discharged (*c*).

(*b*) 3 Wils. 139.

(*c*) Where the declaration is filed, notice thereof must be served on the defendant, and such *notice* must state the time for pleading; See R. M., 1 G. 2; 1 Arch. Prac. 227, 228, 4th ed.

EDWARDS *v.* GREENWOOD.

May 7.

ASSUMPSIT by an indorsee against the maker of a promissory note. *Plea*; that after the making of the note, a bill was drawn by the plaintiff, and accepted by the defendant, and delivered to the plaintiff in satisfaction of the promissory note. *Replication*, denying the making and acceptance and delivery of the bill in satisfaction. *Special demurrer*, on the ground of multifariousness and complexity. *Vaughan*, J., at chambers, had made an order to set aside this demurrer, as frivolous.

To an action on a promissory note, defendant pleaded that, after the making of the note the plaintiff drew a bill on the defendant, which was accepted by him, and delivered to the plaintiff in satisfaction of the note. The plaintiff replied, denying the making and acceptance and delivery of the bill in satisfaction. A special demurrer for multifariousness *held* not frivolous.

Hurlstone had obtained a rule nisi to rescind such order, upon the ground that the replication amounted to *de injuriâ*, which was demurrable, as the plea did not consist merely as matter of excuse. He cited *Crisp* v. *Griffiths* (*a*), *Crogate's Case* (*b*), *Bardons* v. *Selby* (*c*), *Griffin* v. *Yates* (*d*), *Poole* v. *Salter* (*e*).

Peteredorff shewed cause, and contended that the demurrer was clearly for purposes of delay, as the plea only amounted to a single proposition, which the replication in effect traversed. He cited *Webb* v. *Weatherby* (*f*)

TINDAL, C. J.—The question is not whether the replication is a good one, but whether the demurrer is arguable; for if it be so, the defendant is entitled to argue it. I think the rule must be absolute.

Peteredorff then prayed and obtained leave to amend, on payment of costs.

(*a*) 2 C. M. & R. 159.

(*b*) 8 Rep. 132.

(*c*) 9 Bing. 756; 3 M. & Scott, 280; 1 C. & M. 500; 3 Tyr. 341, in *Cam. Scac.*; S. C., in K. B., 3 B. & Ad. 2.

(*d*) 2 New Cases, 579; 2 Scott, 845.

(*e*) 2 C. & J. 85; 2 Tyr. 139; 1 D. P. C. 297; 1 Price, Ca. Pr. 156.

(*f*) 1 New Cases, 502; 1 Scott, 477.

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May 8.

The defendant sold a horse to the plaintiff, with a warranty, for 19*l.*; the plaintiff re-sold him to *J.*, with a similar warranty, for 39*l.* *J.* brought an action against the plaintiff upon his warranty. The plaintiff gave notice thereof to the defendant, who refused to take back the horse; whereupon the plaintiff defended the action brought by *J.* The horse was in fact unsound, and by a reasonable examination, which the plaintiff had an opportunity of making, he might have discovered this before he defended the action: *Held*, that under these circumstances the plaintiff's defence of the action by *J.* was rash and improvident, and that he could not recover from the defendant the costs of such action.

WRIGHTUP *v.* CHAMBERLAIN.

ASSUMPSIT on the warranty of a horse, assigning, as special damage, that the plaintiff, confiding in the defendant's warranty, had re-sold the horse to one *Jolly*, with a similar warranty, for 39*l.*, and that the horse proving unsound, *Jolly* had sued the plaintiff, and recovered the 39*l.*, together with 96*l.* as his costs in that action, and that the plaintiff had been put to further costs, amounting to 30*l.* The defendant paid 19*l.* into Court.

At the trial, before *Parke*, B., at the Spring Assizes for Norwich, 1838, it appeared that on the 3d September, 1836, the horse had been sold by the defendant to the plaintiff, with a warranty, for 19*l.*; that on the 24th of the same month, the plaintiff re-sold it to *Jolly*, with a similar warranty, for 39*l.*; that in July following, *Jolly* offered to return the horse to the plaintiff, alleging it was unsound at the time of the sale; but that the plaintiff refused to receive it, whereupon *Jolly* commenced an action against him, upon his warranty. The plaintiff gave notice to the defendant thereof, and that he should hold him responsible for the result, unless he agreed to take back the horse, which he refused to do. The plaintiff defended the action brought by *Jolly*, who recovered a verdict against him, and had judgment for 135*l.*, made up of the 39*l.* for the price of the horse, and the 96*l.* costs mentioned in the declaration, and which the plaintiff now sought to recover over from the defendant, together with the 30*l.* for further costs. There was no direct proof that the horse was unsound at the time of the respective sales; but evidence was given, that after the horse had been sold to *Jolly*, it underwent an examination, and a defect of long standing was discovered to exist.

Under the direction of the judge, who cited *Boucher* v. *Gwillim* (*a*), a verdict was found for the defendant, with liberty to the plaintiff to move to enter a verdict for the sum claimed.

Storks, Serjt., in last Easter Term, obtained a rule *nisi* accordingly.

R. V. Richards and *Gurdon* shewed cause at the sittings in *Banc* after last Hilary Term (*b*). The plaintiff was not justified, under the circumstances, in defending the action brought by *Jolly*, which the latter was clearly entitled to bring, if the plaintiff would not agree to rescind the contract between them, *Gompertz* v. *Denton* (*c*), *Street* v. *Blay* (*d*), *Patteshall* v. *Tranter* (*e*). By the exercise of ordinary prudence, the plaintiff might have discovered the defect in the horse before he re-sold it; and, therefore, his defending the action was altogether improvident and improper, and he has no

(*a*) K. B., T. T., 1829. This was an action of a similar nature with the present; and on the trial it appeared that the plaintiff had been informed by a third party, before he defended the action brought by the person to whom he (the plaintiff) had re-sold the horse, that he could prove unsoundness while the horse was in the plaintiff's possession. The plaintiff had a verdict for full damages; but the Court set it aside, and granted a new trial.

(*b*) Before *Tindal*, C.J., and *Vaughan* and *Erskine*, Js.

(*c*) 1 C. & M. 209; 3 Tyr. 233; 1 D. P. C. 623.

(*d*) 2 B. & Ad. 456.

(*e*) 1 Har. & Wol. 178; 3 A. & E. 103; 4 N. & M. 649.

right to saddle the present defendant with the costs of such a defence, according to the principle of *Fisher* v. *Fellowes* (*f*). The plaintiff is only entitled to recover from the defendant the sum of 19*l.*, the original cost of the horse, which sum has been paid into Court.

Storks, Serjt., in support of the rule.—As the defendant had notice of the action by *Jolly*, he ought either to have defended it, if he had any ground for so doing, or at once have taken back the horse; by refusing to do so he left the plaintiff no option, he was compelled to defend the action. The present case falls exactly within the principle of *Lewis* v. *Peat* (*g*), and *Green* v. *Greenbank* (*h*). *Neale* v. *Wyllie* (*i*), and *Smith* v. *Compton* (*j*), are also authorities to the same purport. The defendant, by paying the 19*l.* into Court, has admitted that the horse was unsound at the time he sold it to the defendant.

Cur. adv. vult.

TINDAL, C. J., now delivered judgment.—The only question in this case was, whether or not the plaintiff was entitled to recover, as special damage, the costs incurred in the defence of the action, brought against him by *Jolly*, for the breach of his warranty. The real point at the trial was, whether or not the plaintiff might have known, by a reasonable examination of the horse, before he defended the action, that the animal was unsound at the time he sold it to *Jolly*; for if so, the defence was a rash one, and the plaintiff not entitled to charge the defendant with the costs of such improvident defence. Mr. Baron *Parke* reports to us that the plaintiff might, by a reasonable examination, have discovered the unsoundness, and that the 19*l.* paid into Court was a sufficient sum to cover the plaintiff's demand; and so the jury have found. We therefore think the rule must be discharged.

Rule discharged.

(*f*) 5 Esp. 171.
(*g*) 2 Marsh. 431; S. C. *nom. L.* v. *Peake*, 7 Taunt. 153.
(*h*) 2 Marsh. 485.
(*i*) 3 B. & C. 533; 5 D. & R. 442.
(*j*) 3 B. & Ad. 407.

THORNTON *v.* JENYNS and another.

May 8.

THIS was an action against two of the commissioners of *The Bedford Level*, brought upon a contract for certain work to be performed by the plaintiff at a place within the county of *Cambridge*, and in the jurisdiction of the commissioners. The venue was originally laid in *Norfolk*, but had been changed to *Cambridgeshire* at the instance of the defendants, on the usual affidavit.

In an action brought against the Commissioners of *The Bedford Level*, in respect of works to be performed upon *The Level*, the venue having been changed, at the instance of the defendants, from N. to C., the Court refused to order it to be brought back, although it appeared that a great portion of the property in C. was liable to be rated to the expences of *The Level*; as it was not shewn that the jury must *necessarily* be composed of parties liable to be so rated.

Kelly, Q. C., had obtained a rule *nisi* to bring back the venue to *Norfolk*,

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upon an affidavit stating that the defendants were gentlemen of great property and influence in *Cambridgeshire;* that one of them was member for the county; and that a large portion of the property in that county was liable to the rates for *The Bedford Level.*

Wilde, Serjt., now shewed cause, and contended there was no ground made out for the Court to interfere: it was not like a case where it was shewn that strong political or personal feeling existed upon the question in issue, as in *Petyt* v. *Berkeley* (*a*), and *Pybus* v. *Scudamore* (*b*). A similar application had been refused by this Court in *Davies*, dem., *Lowndes*, ten., (*c*), and *Doe*, dem. *Lloyd* v. *Williams* (*d*).

Kelly and *Byles* in support of the rule.—The expences of *The Bedford Level* are defrayed by rates levied upon the different counties that are benefited by the drainage; and as *Cambridgeshire* is one of them, it may happen that a jury summoned from that county may be interested in the event of the suit, inasmuch as the costs may be charged upon the rate, and it is extremely probable that the jury may be composed of parties liable to pay such rate; and this distinguishes the present case from the two cited on the other side.

TINDAL, C. J.—If it had appeared that the jury must *necessarily* have been summoned from parties who would have been liable to contribute to the costs of the action, as being rateable to the expences of *The Bedford Level*, the Court would probably have acceded to the application; but as nothing of this sort has been shewn, I can see no ground for ordering the venue to be brought back to *Norfolk.*

The other judges concurring,

Rule discharged.

(*a*) Cowp. 510.
(*b*) *Ante*, vol. 1, 464; 7 Sc. 124.
(*c*) *Ante*, vol. 1, 272; 4 New Ca. 711: 6 Sc. 435.
(*d*) *Ante*, vol. 1, 469; 5 New Ca. 205; 7 Sc. 143.

May 8.

BARRETT *v.* PARTINGTON.

The defendant gave a *cognovit* to recover 72*l.* (the original debt), but judgment was not to be entered up till default of payment of such sum, with costs to be taxed; which debt and costs were to be paid by instalments: a default having been made in the payment of an instalment, the plaintiff signed judgment for the balance of the debt due, without having had the costs taxed: *Held*, the judgment was regular, but that the costs must be taxed before execution could issue.

PETERSDORFF, on a former day in this Term, had obtained a rule *nisi* to set aside the judgment signed in this case, and subsequent proceedings, for irregularity. The following facts were stated in his affidavits:—

An action having been brought on an attorney's bill for 72*l.*, the defendant gave a *cognovit* for 100*l.*, the defeazance of which was, that no judgment should be entered up "unless and until default should be made in the due pay-

ment of the 72*l.*, together with costs to be taxed by the Master, as between attorney and client, on the days and times, and in the manner following," and the instrument then stated that the money was to be paid by instalments of 5*l.*; but in case default should be made in the due payment of any one or more of the instalments, then immediately on such default being made, the plaintiff was authorized to enter up and sign final judgment thereon, and to issue execution for the whole of the said sum of 72*l.*, with the costs aforesaid, or such part thereof as should remain unpaid at the time of such default, together with all costs of such judgment and execution, &c. Default having been made in one of the instalments, the plaintiff had signed judgment for the balance of the 72*l.* that remained due; but as no bill of costs had been previously delivered to the defendant, so as to give him an opportunity of taxing it, it was contended that the judgment was irregular, on the authority of *Wilson* v. *Northern* (*a*), and *Booth* v. *Parker* (*b*).

Bompas, Serjt., shewed cause.—The necessity to deliver the bill for taxation previous to signing judgment must entirely depend upon the language of the instrument; in this case the *cognovit* raises no such necessity. The debt and costs are to be paid by instalments; and as soon as default is made in one instalment, the plaintiff was at liberty to sign judgment for the balance of the debt, which he has done. He may tax his costs before execution, and take out execution for the whole sum. The cases cited are very distinguishable from the present. In *Wilson* v. *Northern*, the whole debt was to be paid on a particular day, and if not paid, the costs were to be taxed, and judgment signed; so that it was clear that, by the terms of the instrument, the judgment was not to be signed till the costs had been taxed. *Booth* v. *Parker* was a still stronger case, for there the debt, interest *and costs* were to be paid on a day certain, and in default of such payment only, that is, of the whole sum made up of debt, interest *and costs*, the plaintiff was entitled to sign judgment.

Petersdorff, in support of the rule, argued that the present case was not distinguishable in principle from those cited. The defendant was entitled to information as to the precise sum he was required to pay before the judgment was signed, or he could not have discharged himself by making a tender.

TINDAL, C. J.—The language of the *cognovit* in this case differs materially from that of the instruments in the two cases cited. Here the sum of 72*l.* is to be paid, together with costs, by certain instalments; and the plaintiff is entitled to enter up judgment as soon as default is made in one of such payments. Default having been made, he has entered up judgment accordingly for the balance of the debt due; this I think he was entitled to do, though he cannot issue execution for the costs till he has had them taxed.

BOSANQUET, COLTMAN, and ERSKINE, Js., concurred.

Rule discharged.

(*a*) 4 D. P. C. 212.

(*b*) Mur. & Hurl. 354; 3 M. & W. 54; 6 D. P. C. 87.

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JACKSON *v.* NICHOL and another.

The delivery of goods by the seller to a carrier, by the order of the buyer's agent, for the purpose of being forwarded to the buyer, is not such a constructive delivery to the buyer as to put an end to the seller's right of stoppage *in transitu*.

Although it seems to be the better opinion that if the buyer actually takes possession of his goods before their arrival at the place of their ultimate destination, the seller's right of stoppage *in transitu* is thereby defeated (a); yet a mere demand by the buyer, before such arrival, without any delivery, will not have that effect.

C., the agent of *M.*, bought some lead of the plaintiff at *Newcastle*, which was shipped by *C.'s* order, to be forwarded to *M.* in *London*. Upon the vessel's arrival in the *Thames*, the lead was demanded by *M.*, but the captain refused to deliver it; it was put on board a lighter belonging to the defendants, who were warehousemen; and who had undertaken the delivery of the lead by his orders: while still on board the lighter it was demanded by the plaintiff:—*Held*, that at the time of such demand his right of stoppage still existed.

TROVER for 284cwt. 18lbs. of lead. Plea, denying the plaintiff's property in the lead, whereupon issue was joined. The cause was tried before *Tindal*, C. J., at the adjourned Sittings after Michaelmas Term, 1837, when the jury found a verdict for the plaintiff for 304*l.* 9*s.* 2*d.*, subject to the opinion of the Court upon the following *Case*, with power to the Court to draw inferences from the facts stated, in the same manner as the jury might have done.

On the 12th October, 1836, *Joseph Crawhall*, a merchant at *Newcastle-upon-Tyne*, as agent on behalf of *Thomas Maltby*, Son and Co., then carrying on the business of lead merchants and patent shot manufacturers in *London*, contracted with the plaintiff for the purchase of some old lead; and the following is a copy of the contract:—

"Memorandum, October 12th, 1836. That I have this day bought of *C. F. Jackson*, Esq., about thirty-five or forty tons of old lead, at the price of 22*l.* 10*s.* per fodder of 21cwt., payable by a bill at six months from the time of delivery, the usual allowance of tare of 4lbs. per cwt.

"For *Thomas Maltby*, Son and Co.,
"*Joseph Crawhall*

"I confirm the above,
"*C. F. Jackson.*"

For some years previous to the purchase, *Crawhall* had acted as agent for *Maltby* and Co. in the purchase and shipping of lead on their account, and had shipped for them largely. He had been in the habit of shipping for them lead to *Russia*, *France* and *Holland*, as well as to *London*. His general course of dealing as to shipping the lead was, after he had so purchased the lead, to hold it in his possession until he received directions from *Maltby* and Co. to ship it.

On the 8th October, 1836, *Crawhall* wrote a long letter upon business to *Maltby* and Co., the following extract from which relates to the lead in question:—

"Mr. *Jackson*, of whom I purchased some old lead for you, has another parcel for sale, say thirty-five or forty tons, which he offers at 24*l.* a fodder, usual terms. I told him I thought that too high, but would forward it. Please say if you will buy, and at what price. I will do the best I can."

On the 10th October, 1836, *Maltby* and Co. wrote to *Crawhall*, authorizing him to make the purchase. The following is a copy of that letter:—

"We have received yours of the 8th October. We are scarcely disposed to make any purchases just now, but should not like Mr. *Jackson's* lead to

(a) See note (*n*), *post*, p. 39.

be hanging on the market, and, therefore, authorize you to give 23*l.* per fodder for it, six months."

On the 12th October, 1836, *Crawhall* advised *Maltby* and Co. of the aforesaid purchase, by the following letter:—

"I have yours of the 10th, and have bought thirty-five to forty tons of old lead of Mr. *C. F. Jackson*, at ten shillings per fodder less than you limited; viz., 22*l.* 10*s.*, payable by bill at six months from delivery, which will be a month or two, the usual allowance to be made for tare."

On the 4th November, 1836, *Maltby* and Co. addressed a letter from *London* to *Crawhall* at *Newcastle*, containing the following paragraph relative to the lead in question:—

"We shall be glad also if you will inform us when the old lead, purchased some time since, will be forwarded; for, the price declining as it has done, may render further delay in the delivery detrimental to us."

Crawhall had no direction about sending the lead to *London* but the above. He had no instructions to send it anywhere when he bought it. *The lead remained in the possession of the plaintiff*, without any orders or directions from *Maltby* and Co., or *Crawhall*, from the time of the purchase until the 5th January, 1837, when, at the request of *Crawhall*, the plaintiff addressed to *John Johnson*, one of his workmen, an order, directing him to deliver the lead to the order of *Crawhall*, of which the following is a copy:—

"Deliver to the order of Mr. *Joseph Crawhall* the old lead."

And on the 7th January, 1837, *Crawhall*, by his clerk, *G. Backhouse* made an order in writing for the delivery of the lead immediately below the above order, of which the following is a copy:—

"Deliver the above to the bearer, to go on board the Esk, *Purvis*, master and furnish me with the particulars as early as possible."

The above orders were delivered by *Backhouse* to *Nichol, Ludlow* and Co., of *Newcastle*, who are wharfingers there, and owners of the Esk, a trader between *Newcastle* and *London*. *Nichol, Ludlow* and Co., on the 9th January, gave the above delivery orders to *R. Gundry*, a keelman, to go for the lead, and take it on board the Esk. *Gundry* got the lead on that day, and took it on board the Esk accordingly, and *Gundry* was paid for so doing by Mr. *Graham*, one of the firm of *Nichol, Ludlow* and Co., who charged the same to *Crawhall*, by whom they were repaid, and *Crawhall* charged the same to *Maltby* and Co.

On the 9th January, 1837, the plaintiff sent to *Crawhall* an invoice, of which the following is a copy:—

"Newcastle, 9th January, 1837.

"Messrs. Maltby, Son and Co.,
"Drs. to C. F. Jackson.

	cwt.	qrs.	lbs.
"To 215 pieces of old lead, weighing . . .	294	2	21
"Deduct tare, 4lbs. per cwt.	10	2	3
	284	0	18

	£	s.	d
"Fodders, 13 11 18, at 22*l.* 10*s.* per fodder of 21 cwt.	304	9	2

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On the 14th January, 1837, *Crawhall* sent to *Maltby* and Co. a bill of lading of this and other lead, inclosed in a letter, of which the following is a copy:—

"Inclosed I hand you bills of lading for lead shipped to your address as above, which I trust you will receive safe in due course."

The following is a copy of the bill of lading signed by *Nichol, Ludlow* and Co., for the captain of the Esk:—

"640 pieces of lead, weighing 960cwt., and marked 'Derwent mines Co.'

"215 pieces of old lead, weighing 284cwt. 18lbs.

"Shipped by the grace of God, in good order and well conditioned, by Joseph Crawhall, in and upon the good ship called the Esk, whereof is master, under God, for this present voyage, John Purvis, and now riding at anchor in the river Tyne, and by God's grace bound for London, to say eight hundred and fifty-five pieces of lead, weighing 1,244cwt. 18lbs. being marked as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of London, all and every the dangers and accidents of the seas and of navigation of whatever nature and kind soever excepted, unto the order of Thomas Maltby, Son and Co., he or they paying freight for the said goods customary, with average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor or date, the one of these bills being accomplished, the other two to stand void. And so God send the good ship to her destined port in safety. Amen. Dated in Newcastle, 14th January, 1837.

"Weight unknown."

The bill of lading was filled up by *Backhouse*, the clerk of *Crawhall*. The 215 pieces of old lead stated in the margin of the bill of lading is the lead in question.

The Esk arrived at her moorings off the Tower of *London* with the lead, and a general cargo on board, on the 21st January, 1837. The lead could not have been unloaded before the 24th of that month. The ship did not deliver her cargo at any wharf, but, as on former occasions, delivered in the stream, a wharfinger undertaking the management of her delivery. In this instance, *the defendants*, who are wharfingers, *by* Maltby *and Co.'s orders, undertook the delivery*.

Maltby and Co. stopped payment on the 21st January, 1837.

On the 23d January, 1837, *Fishwick*, the managing clerk at *Maltby* and Co.'s, on their behalf, made out an order for the captain of the Esk to deliver the lead for *Maltby* and Co. on board a lighter; and, on the next day, *Fishwick* produced the bill of lading and the order to the mate on board the Esk, the captain not then being on board, and tendered the freight to him, and requested the delivery of the lead accordingly; but the mate said he could not deliver it, because the delivery had been stopped; and, as far as *Fishwick* recollected, the mate said it was stopped by the defendants. There-

upon *Fishwick* came away; and on the 24th January, 1837, he served upon the mate on board the Esk, and also upon the defendants, the wharfingers, a demand of delivery of the lead, of which the following is a copy:—

"Frederick's Place, Old Jewry.

"January 24, 1837.

"Gentlemen—We are instructed by Messrs. Thomas Maltby, Son and Co. to demand the delivery to them, according to the bill of lading which they hold, of 855 pieces of lead, their property, shipped on board the Esk, Purvis, master, now arrived in the port of London. We, on their behalf, hereby offer to pay the freight for the said lead, according to the bill of lading, and give you notice that you will be held responsible to Messrs. T. Maltby, Son and Co. for the said lead, and all consequences of your refusal, if you persist in refusing to deliver the same.

"Swain, Stevens and Co.

"To Captain John Purvis, and the owners of the Esk, and Messrs. Anthony Nichol and Son, and whom else it may concern."

Fishwick at the times of such services, produced the bill of lading, tendered the frieght, and demanded the lead; but they refused to deliver it, on account of the stoppage of payment of *Maltby* and Co.

On the 24th January, *Bostock*, the foreman to Mr. *Drew*, a lighterman, went in his barge, by the direction of *Maltby* and Co., alongside the Esk, to receive the lead: he saw the mate of the Esk, and asked him if he had not on board the Esk some lead for *Maltby* and Co.; and the mate said that he had lead on board for them, but that he could not deliver it, as it was stopped by the defendants.

On the 26th January, 1837, the plaintiff, on hearing of the stoppage of payment of *Maltby* and Co., and not having been paid the price of the lead, applied to his attorney, Mr. *John Brown*, of Newcastle, who forwarded a letter by post to his correspondent, Mr. *W. W. Simpson*, in London, of which the following is a copy:—

"My friend, Mr. C. F. Jackson, lately sold to Thomas Maltby, Son and Co. some old lead, through the medium of Mr. Joseph Crawhall, their agent. Part of this lead was shipped on board the Esk from here to London; and Maltby and Co. have failed. Mr. Jackson wishes, therefore, a notice to be given immediately to the captain, and Mr. Crawhall, if in London, and to the wharfinger, that he, the seller of the goods, claims to stop them in transitu, (as we call it in law). Will you, therefore, be so good as to do this, and, if necessary, to employ a law-man, or some other broker. Whether this notice will eventually be available is a matter of future consideration. Will you please write by return, informing me of what is done."

On the same sheet of paper the plaintiff also wrote to the said *W. W. Simpson* a letter, of which the following is a copy:—

"I request you will act in my behalf respecting the lead as stated below, and that you will take possession of the same for me; and what you do will be ratified by me,

"C. F. Jackson.

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"1837, January. 215 pieces old lead, 29 4cwt. 2qrs. 21lbs., shipped by the ship Esk, John Purvis, master, from Newcastle to London. Shipped probably in the name of Crawhall, for Thomas Maltby, Son and Co. Sold by C. F. Jackson."

Anthony Nichol and Son, the defendants, are wharfingers at *Dowgate Wharf*, and agents for the Esk in *London*.

The letter arrived by post on the 28th, and *Simpson* immediately proceeded to look after the lead, and found it in a lighter in the *Thames*, by the order, and under the control of the defendants, the wharfingers; and he thereupon went to the defendants at *Dowgate Wharf*, and shewed them the plaintiff's letter, and on the plaintiff's behalf demanded the lead of them, and gave them notice not to deliver it to *Maltby* and Co. The defendants, upon that occasion, refused to deliver the lead to Mr. *Simpson* on behalf of the plaintiff, unless he (*Simpson*) would give them an indemnity.

The question for the opinion of the Court was, whether there was not a delivery to *Maltby* and Co., by the delivery by the plaintiff to the order *Crawhall*, their agent, at Dent's Hole, or on board the Esk; and, if n whether, on the 23d or 24th January, 1837, when the demands were made by *Fishwick* and *Bostock*, on behalf of *Maltby* and Co., the transit was not at an end; or whether, on the 28th January, 1837, when the demand of the lead was made by the plaintiff's agent, it was in its transit from the plaintiff to *Maltby* and Co. If the Court should be of opinion that there had been no such delivery to *Maltby* and Co., or that the transit was not at an end on the 28th January, then the verdict for the plaintiff to stand; otherwise, a verdict to be entered for the defendants.

Wightman for the plaintiff.—There is no question but that the lead never came to the *actual* possession of Messrs. *Maltby*, the buyers; nor was it ever in their *constructive* possession; for it was not in fact delivered to *Crawhall*, their agent at *Newcastle*, but was shipped by his order on board the Esk. On the arrival of that vessel in the *Thames*, the delivery of it was *demanded* by an agent on behalf of Messrs. *Maltby*, but no delivery of it took place to him; and from on board the Esk, it passed to the custody of the defendants, who are wharfingers, and while in their possession, the demand and refusal occurred, on which the present action is founded. The lead, therefore, had not reached its ultimate destination, and the plaintiff's right of stoppage *in transitu* still existed, the seller of goods always retaining such a right so long as the goods are in passage to the hands of the buyer, *Stokes* v. *La Riviere* (*b*). That right will not be determined by part payment by the buyer, *Hodgson* v. *Loy* (*c*), or even by delivery to the buyer's agent, if such delivery is for the purpose of transmitting them to their ultimate destination, *Bohtlingk* v. *Inglis* (*d*), *James* v. *Griffin* (*e*), *Nicholls* or *Slater* v. *Le Feuvre* (*f*).—[*Tindal*, C. J.—Suppose a consignee sent a cart to the carrier's warehouse for goods, and they were taken into it to be conveyed to the consignee's warehouse, would not the *transitus* be at an end?]—If it was the

(*b*) Cited 3 T. R. 466; 3 East, 397.
(*c*) 7 T. R. 440.
(*d*) 3 East, 381; S. C. nom. *Boehtlinck* v. *Schneider*, 3 Esp. 58.
(*e*) 1 M. & W. 20; 2 M. & W. 623.
(*f*) 1 Hodg. 255; 2 New Ca. 81; 2 Scott, 146; 7 C. & P. 91.

consignee's own cart, possibly it might be considered that the goods, by being placed therein, had arrived at their ultimate destination, and were actually in the consignee's possession; but if the cart were hired for the purpose, it would probably be held that the *transitus* was still continuing: but at any rate, in the present case, the defendants cannot be considered as the agents for Messrs. *Maltby* for the ultimate reception of the lead, but merely for the purpose of forwarding it to them.

Bompas, Serjt., for the defendants.—First, the delivery, as between the sellers and the buyers, was complete at *Newcastle*. The goods were sold by the plaintiffs to *Crawhall*, as agent for Messrs. *Maltby*, and, therefore, he had a right to insist on a delivery to him, the contract of sale being entirely silent as to any place where the lead was to be delivered; this being so, the delivery of the lead to his order on board the Esk was tantamount to a delivery to him, and a delivery to an agent, under such circumstances, is a constructive delivery to the buyers, *Leeds* v. *Wright* (*g*), *Dixon* v. *Baldwen* (*h*), *Rowe* v. *Pickford* (*i*).

Secondly, supposing the goods were *in transitu* till they arrived in *London*, as soon as they did arrive there the transit was at an end, that being the port of destination, *Coates* v. *Railton* (*j*), and the buyers might go and claim them from the carrier, without waiting till they were sent by them to the buyers' warehouse; nor could the tortious act of the master of the Esk, in refusing to deliver them when demanded on behalf of Messrs. *Maltby*, vary the rights of the parties; "for," as was said by *Lawrence*, J., in delivering the judgment of the Court in *Bohtlingk* v. *Inglis*, "it shall never be permitted to a carrier, by not delivering the goods, to vary the property, and decide to whom they shall belong (*k*)."

Thirdly, at all events, as soon as the lead was put on board the defendants' lighter, it was constructively in the possession of the buyers; for the defendants, who undertook the delivery by order of the Messrs. *Maltby*, must be considered as their agents for the purpose of receiving the goods, and, consequently, a delivery to them would put an end to the seller's right of stoppage *in transitu*, upon the same principle that a delivery of goods into a ship chartered by the buyer would, *Fowler* v. *M'Taggart* (*l*).

Wightman, in reply.—It may fairly be assumed, that the ultimate destination of the lead was at Messrs. *Maltby's* warehouse; and there is no pretence for saying that the defendants' warehouse was to be used as the warehouse of Messrs. *M.* The lead, however, was still on board the defendants, lighter when claimed on behalf of the plaintiffs, and was, therefore, clearly as much *in transitu* as if it had been on board the Esk.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.—The first question which arises upon this special case is, whether the *transitus* was at an end, either by the delivery of the lead from the premises of the plaintiff (the seller) to the order of *Crawhall*, the agent of the buyers, or by the putting

(*g*) 3 B. & P. 320.
(*h*) 5 East, 175.
(*i*) 8 Taunt. 83.
(*j*) 6 B. & C. 422; 9 D. & R. 593.
(*k*) 3 East, 394.
(*l*) Cit. 7 T. R. 442; 1 East, 522.

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of the same on board the Esk; and upon this question we are of opinion that the *transitus* was not determined on either of those occasions.

The general rule is, that the *transitus* is not at an end until the goods arrive at the actual or constructive possession of the consignee. And if the lead had been delivered into the possession of *Crawhall*, as the agent of the buyers, there to remain until *Crawhall* received orders for its ulterior destination, such possession of *Crawhall* would have been the constructive possession of the buyers themselves, and the right to stop *in transitu* would have been at an end. The case would then have fallen within the principle laid down in *Dixon* v. *Baldwen*. But upon the facts stated in this special case, the lead in question never came into the actual possession of *Crawhall*, the agent; for on the 9th of January, 1837, it was delivered from the premises of the plaintiff, the seller, to a keelman in the employ of the defendants, for the purpose of being put on board the defendants' vessel, the Esk, a general trader between Newcastle and London, and by him was so taken and put on board accordingly. Neither, again, does *Crawhall* appear to have been an agent of the buyer for the purpose of receiving the lead into his possession, either as a place of deposit, until he received directions from the buyer for its ulterior destination, or for sending it on to the buyer under general directions for that purpose; for whatever may have been his course of dealing on former occasions, in this particular transaction he acted on, and was clothed with no other authority than that which he derived from the letter of the buyer dated the 4th of November, 1836; that is, merely upon a desire expressed in that letter that the lead should be forwarded without delay. And we think the order given by the plaintiff to deliver the lead to the order of *Crawhall*, and the subsequent order by *Crawhall* "to deliver it to the bearer (who was the keelman), to go on board the Esk," did not amount to any taking possession by *Crawhall*, but merely formed a link in the chain of the machinery by which the lead was put in motion and in a course of transmission from the seller's premises in *Newcastle* to the buyers' in *London*, the legal consequence being precisely the same as if the order to forward the lead had come direct from the buyer to the seller, instead of circuitously through *Crawhall's* hands; and further, that the putting of the lead on board the Esk was only a continuance of such *transitus*.

The second question is, whether the *transitus* was at an end at the time the stoppage took place in the river, that is, on the 28th January; as to which the facts are, that after the Esk had arrived with the lead on board at her moorings in the river *Thames*, the lead was put on board a lighter for the purpose of being carried to the defendants' wharf. On the 28th of January, the demand was made on the behalf of the plaintiff, the lead being at that time on board the lighter, and the defendants' servants refused to deliver it.

It is left in some degree of uncertainty, upon the statement of the case, whether the defendants' refusal to deliver the lead proceeded from any adverse claim which they had against Messrs. *Maltby* and Co., the buyers, or whether it was simply a refusal to deliver, as holding the lead for *Maltby* and Co.; but we think in either case the plaintiff's right of stoppage still existed. For as the right of the vendor to stop *in transitu* is not defeated, by any claim of the carrier for his lien for a general balance, or even by a foreign attachment laid upon the goods by a creditor, *Oppenheim* v. *Russell*(*m*)

(*m*) 3 B. & P. 42.

it follows that if any claim of lien for a debt due to the defendants existed, of which there is no statement in the case, it would not operate to defeat the plaintiff's right; and if the goods were in the lighter, not being subject to any such claim, they were still in a course of *transitus* in order to be delivered, and were not actually delivered to the buyer, notwithstanding the defendants undertook the delivery by the order of *Maltby* and Co.

It was urged on the part of the defendants, on the authority of the *dictum* of *Lawrence*, J., in *Behtlingk* v. *Inglis*, that the tortious act of a third person should not prejudice the rights of the parties; and, consequently, that the demand made by *Fishwick*, the clerk of *Maltby* and Co., on the 24th, and the unlawful refusal to deliver, was tantamount to a delivery. But it is to be recollected, in the first place, that the observation of Mr. Justice *Lawrence* was made in the case of a demand by the consignor for the purpose of re-vesting his property in the goods, and not in the case of vendee. And, in the second place, that here the goods had not actually reached the terminus of their delivery when the demand of the vendee took place; and although it might be conceded to be the better opinion, that if the vendee actually receives the possession of his goods on their passage to him, and before the voyage has completely terminated, that the delivery is complete, and the right of stoppage gone (*n*); yet no authority has been cited for the position, and the principle seems the other way, that a mere demand by the vendee, without any delivery, before the voyage has completely terminated, deprives the consignor of his right of stoppage.

On the whole, we think the *transitus* was not at an end when the stoppage took place, and that the verdict must be entered for the plaintiff.

Judgment for plaintiff.

(*n*) See *per* Lord *Alvanley*, C. J., in *Mills* v. *Ball*, 2 B. & P. 461; *per Chambers*, J., in *Oppenheim* v. *Russell*, 3 B. & P. 54; *Foster* v. *Frampton*, 6 B. & C. 107; 9 D. & R. 108; 2 C. & P. 469, ACC.; *per* Lord *Kenyon*, C. J., in *Holt* v. *Pownall*, 1 Esp. 240, CONT.

IZON *v.* GORTON and another.

May 8.

ASSUMPSIT. First count "for the use and occupation of certain rooms, apartments and premises," second count, on an account stated. *Pleas:* first, *non assumpsit*, except as to 10*l.* 10*s.*; second, a tender and payment into Court to that amount.

The cause came on for trial before *Tindal*, C. J., at the adjourned Sittings for London after Trinity Term, 1837, when a verdict was found for the plaintiff for 109*l.* 10*s*, being the amount claimed, deducting the sum tendered and paid into Court, subject to the opinion of the Court on the following *Case*.

The plaintiff was a lessee for a term of years of a warehouse in the city of *London*, of which he occupied the ground floor and cellar in his trade of an ironmonger.

An upper floor, rented by a tenant from year to year, was accidentally destroyed by fire, and rebuilt by the landlord; but the tenant refusing to occupy the new premises, they were let by the landlord to another tenant; —*Held*, that as the fire did not determine the tenancy, an action was maintainable for the period between the fire and the re-letting.

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of the same on board the Esk; and upon this question we are of opinion that the *transitus* was not determined on either of those occasions.

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The second question is, whether the *transitus* was at an end at the time the stoppage took place in the river, that is, on the 28th January; as to which the facts are, that after the Esk had arrived with the lead on board at her moorings in the river *Thames*, the lead was put on board a lighter for the purpose of being carried to the defendants' wharf. On the 28th of January, the demand was made on the behalf of the plaintiff, the lead being at that time on board the lighter, and the defendants' servants refused to deliver it.

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(*m*) 3 B. & P. 42.

it follows that if any claim of lien for a debt due to the defendants existed, of which there is no statement in the case, it would not operate to defeat the plaintiff's right; and if the goods were in the lighter, not being subject to any such claim, they were still in a course of *transitus* in order to be delivered, and were not actually delivered to the buyer, notwithstanding the defendants undertook the delivery by the order of *Maltby* and Co.

It was urged on the part of the defendants, on the authority of the *dictum* of *Lawrence*, J., in *Bohtlingk* v. *Inglis*, that the tortious act of a third person should not prejudice the rights of the parties; and, consequently, that the demand made by *Fishwick*, the clerk of *Maltby* and Co., on the 24th, and the unlawful refusal to deliver, was tantamount to a delivery. But it is to be recollected, in the first place, that the observation of Mr. Justice *Lawrence* was made in the case of a demand by the consignor for the purpose of re-vesting his property in the goods, and not in the case of vendee. And, in the second place, that here the goods had not actually reached the terminus of their delivery when the demand of the vendee took place; and although it might be conceded to be the better opinion, that if the vendee actually receives the possession of his goods on their passage to him, and before the voyage has completely terminated, that the delivery is complete, and the right of stoppage gone (*n*); yet no authority has been cited for the position, and the principle seems the other way, that a mere demand by the vendee, without any delivery, before the voyage has completely terminated, deprives the consignor of his right of stoppage.

On the whole, we think the *transitus* was not at an end when the stoppage took place, and that the verdict must be entered for the plaintiff.

Judgment for plaintiff.

(*n*) See *per* Lord *Alvanley*, C. J., in *Mills* v. *Ball*, 2 B. & P. 461; *per Chambers*, J., in *Oppenheim* v. *Russell*, 3 B. & P. 54; *Foster* v. *Frampton*, 6 B. & C. 107; 9 D. & R. 108; 2 C. & P. 469, ACC.; *per* Lord *Kenyon*, C. J., in *Holt* v. *Pownall*, 1 Esp. 240, CONT.

IZON *v.* GORTON and another.

May 8.

ASSUMPSIT. First count "for the use and occupation of certain rooms, apartments and premises," second count, on an account stated. *Pleas:* first, *non assumpsit*, except as to 10*l.* 10*s.*; second, a tender and payment into Court to that amount.

The cause came on for trial before *Tindal*, C. J., at the adjourned Sittings for London after Trinity Term, 1837, when a verdict was found for the plaintiff for 109*l.* 10*s*, being the amount claimed, deducting the sum tendered and paid into Court, subject to the opinion of the Court on the following *Case*.

The plaintiff was a lessee for a term of years of a warehouse in the city of *London*, of which he occupied the ground floor and cellar in his trade of an ironmonger.

An upper floor, rented by a tenant from year to year, was accidentally destroyed by fire, and rebuilt by the landlord; but the tenant refusing to occupy the new premises, they were let by the landlord to another tenant; —*Held*, that as the fire did not determine the tenancy, an action was maintainable for the period between the fire and the re-letting.

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On the 23d of August, 1830, the defendants entered into the occupation of the two upper floors of the said warehouses as under-tenants to the plaintiff, at the rent of 80*l.* *per annum*, which was paid quarterly, and continued in the actual occupation of such rooms, by using them as a warehouse for hops, from that time until the 12th November, 1834, when the said floors were consumed by fire, as after mentioned. During their occupation, the roof, which was the only covering to the upper floor occupied by the defendants, was occasionally repaired by the plaintiff, when repair was wanting. There was a crane and jib in the upper floor occupied by the defendants, used for the purpose of raising goods to the defendants' rooms, and also used by plaintiff when he had occasion. This crane and jib were also repaired by the plaintiff at the instance of the defendants, who, on one occasion, refused to pay their rent till such repairs were done. These repairs were beneficial to both parties, though defendants were most urgent as to the extent of them. The plaintiff also paid all rates and taxes.

On the 12th of November, 1834, a fire accidentally broke out in the night in the rooms so occupied by the defendants, by which the whole of the defendants' stock was destroyed, and the said rooms were so damaged that they became altogether untenantable. The plaintiff had insured the whole house, of which the rooms in question were part. From the time of the fire there was no occupation in fact by the defendants of the premises, and no interference with them for any purpose. The plaintiff, after a delay occasioned by a dispute with the insurance office, recovered the sum insured, and thereupon proceeded to repair the premises. The repairs were completed, and the rooms ready for use and occupation, by the 4th June, 1835. Soon after Christmas, 1834, the plaintiff applied to the defendants for the whole rent of the quarter which was running at the time when the fire broke out, to which application the defendants answered that they were ready to pay a proportionable amount of the quarter's rent up to the day on which the fire broke out, but that from that day they considered their tenancy to have ceased, and that they were no longer liable to rent. The plaintiff insisted that the tenancy had not ceased, and that the defendants were liable to pay the rent, and said that he should require it to be paid. Several similar applications were afterwards made for rent, as it was claimed to have accrued, to which the same answers in effect were returned, and the plaintiff was referred to the solicitor of the defendants. On the 4th of June, 1835, a letter was written and sent by the plaintiff to the defendants, stating, "your floors are quite ready for use and purpose as before; the floors are finished quite superior, and we have no doubt but you will like them much better. They are very light and pleasant."

The defendants received the above letter, but returned no answer to it. The plaintiff afterwards applied to the defendants for the whole year's rent due at Michaelmas, 1835, when the defendants again refused to pay any rent except up to the time when the fire happened; and in respect of the rent to that period, they tendered the sum of 10*l.* 10*s.*, which they have since paid into Court in the action, and which the plaintiff has taken out of Court. The premises remained unoccupied in fact from the time of the fire up to the 25th of March, 1836, to which time the plaintiff makes his claim. The question for the opinion of the Court was, whether, under the circumstances above stated, the plaintiff was entitled to recover from the defendants for the use

and occupation of the rooms and premises for the period that elapsed between the said 12th of *November*, 1834, when the fire happened, and the 25th of *March*, 1836.

If the Court should be of opinion that the plaintiff was entitled to recover for the use and occupation of the rooms, for the whole of the said last-mentioned period, then the verdict was to stand for the sum of 109*l*. 10*s*. And if the Court should be of opinion that the plaintiff was entitled to recover for any part of that period, the judgment was to be entered up for the plaintiff, for a sum estimated at the rate of 80*l*. a-year, and in proportion to the period for which the Court should think the plaintiff so entitled. But if the Court should be of opinion that the plaintiff was not entitled to recover for any part of that period, then a verdict should be entered for the defendants, or a nonsuit, as the Court might direct.

The case was argued in *Hilary* Term by

Peacock for the plaintiff.—The fire did not determine the tenancy of the defendants, who were tenants from year to year; nor did it entitle them to do so; and even if it did, the defendants were bound to have declared their intention immediately, and were not justified in waiting till the plaintiff applied for his rent after the *Christmas* following, before they declared such intention, when it was too late for them to do so. The fire did not discharge the defendants from their liability to pay the rent, or for the use and occupation of the premises, for any portion of the time; but even if it could discharge them from any portion of it, they were bound to pay up to the time when they declared their intention to determine the tenancy, and at least up to the end of the current quarter, namely, *Christmas*, 1834; and they were bound to pay rent again at any rate from the 4th *June*, 1835, when the repairs were completed, and they had notice thereof. He cited *Brown* v. *Quilter* (*a*), *Baker* v. *Holtpzaffel* (*b*), *Holtpzaffel* v. *Baker* (*c*), *Mollett* v. *Brayne* (*d*), *Grimmann* v. *Legge* (*e*), 1 *Wms. Saund.* 323. b. n. 7(*f*).

Tomlinson for the defendants.—The defendants were under no contract to repair or pay for any certain time, and therefore they are not liable in this form of action to pay for the use and occupation of apartments of which they could have no use or occupation, after their entire destruction by fire, and which it was necessary for the landlord to rebuild: and the tenancy, having been determined by these events, could not be revived without the consent of both parties. He cited *Edwards* v. *Hetherington* (*g*), *Collins* v. *Barrow* (*h*), *Nash* v. *Tatlock* (*i*), *Whitehead* v. *Clifford* (*k*).

Peacock in reply.—So long as the tenant's interest in the premises subsists, the action for use and occupation is maintainable, though there be no actual

(*a*) Ambler, 619; cited 1 T. R. 708.
(*b*) 4 Taunt. 45.
(*c*) 18 Ves. 116; cited 4 Taunt. xii.
(*d*) 2 Camp. 103.
(*e*) 8 B. & C. 324; 2 M. & R. 438.
(*f*) See also *Howe* v. *Kennett*, 1 Har. & Wol. 391; 3 Ad. & Ell. 659; 5 N. & M. 1.
(*g*) 1 Ry. & Moo. 268; 7 D. & R. 117.
(*h*) 1 Moo. & Rob. 112.
(*i*) 2 H. Bl. 320.
(*k*) 5 Taunt. 518. See also *Doe* dem. *Read* v. *Ridout*, 5 Taunt. 519.

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occupation by him; and it is clear that in this case the fire did not determine the defendant's interest. A party who is in possession of the upper floor of a house has a right to the support of the lower walls, and may have a writ to compel the occupier of the lower rooms to repair the foundation. *Vin. Abr.* tit. *House* (F. 1.) F. N. B. 127 F. (*l*)

Cur. ad. vult.

TINDAL, C. J., now delivered judgment.—The defendants in this case being tenants from year to year to the plaintiff of the upper floors of a warehouse, at a rent payable quarterly, a fire broke out in the defendants' rooms accidentally, in the middle of a quarter, by means of which the floors were consumed, and the defendants' rooms so damaged, that they became altogether untenable, until the plaintiff had completed their repairs, after about seven months' interval from the time of the fire.

Two questions have arisen between the parties upon this state of facts, viz. first, whether the defendants are liable to the payment of any, and what rent, after the termination of the quarter which was current at the time of the fire (up to the end of which quarter the rent has been paid into Court); and secondly, if liable to rent at all, whether it can be recovered in an action for use and occupation.

Upon the first point, we can see no legal ground for holding that the relation of landlord and tenant, between these parties, was determined by the consumption of the premises by fire. If there had been an agreement in writing, between the parties, for a term of years, no question could have been made, but that the term still existed; and a tenancy from year to year, until it is determined by a notice to quit, is, as to its legal character and consequences, the same as a term for years. Upon the facts stated in this case, it must stand admitted that the tenancy was not determined by any regular notice to quit; and the case of *Baker* v. *Holtpzaffel* is a direct authority, that a tenancy for a term under an agreement, not being an instrument under seal, is not determined by a fire during the continuance of the tenancy. We think, therefore, the defendants continued tenants to the plaintiff until such tenancy was put an end to by the plaintiff's letting of the premises to a stranger, *viz.* at *Lady Day*, 1836, and that they are liable to rent up to that day.

The remaining question is, whether the defendants are liable in this form of action. The stat. 11 *Geo.* 2, c. 19, enables landlords "to recover a reasonable satisfaction for lands, &c. held *or* occupied by the defendant, in an action on the case, for the use and occupation of what was so held *or* enjoyed," from which it seems to follow, that if there is an actual *holding*, and the power to occupy or enjoy is given by the landlord to the tenant, so far as depends on the landlord, the action is maintainable. Here nothing was done by the landlord to take away the continuance of the occupation or enjoyment by the tenant, for it would, as it appears to us, be unreasonable to hold that the landlord's act in replacing the floor, and repairing the walls of the defendants' rooms, amounted to an eviction; and though in

(*l*) *Scil.* a writ in the nature of *De reparatione faciendâ*; but the writ as given by *Fitzherbert*, directed to the mayor and sheriff of a town, is founded upon a *custom* of such town.

the case above cited, where it was held that the action for use and occupation would lie, some stress was placed by the Court upon the fact, that the land was still in existence, and there was no offer on the part of the defendant to give it up; so it might be argued in the present case, the space enclosed by the four walls, still continued as marked out by them. If the landlord rebuilds, and the tenant chooses to re-enter, and to continue his occupation of the new building, there seems nothing to prevent him, as no notice to quit had been given on either side; and if so, the obligation of each of the parties must be reciprocal, and the tenant must make satisfaction for the rent. The cases referred to in the argument, in which the tenant has been allowed to withdraw himself from the tenancy, and to refuse payment of rent, will be found to be cases where there has been either error or fraudulent misdescription of the premises which were the subject of the letting, or where the premises have been found to be uninhabitable by the wrongful act or default of the landlord himself; neither of which circumstances occurs in this case.

Upon the whole, we think the plaintiff is entitled to judgment for 109*l.* 10*s.*

Judgment for plaintiff.

LAWRENCE and another, Assignees of W. OKILL, a Bankrupt *v.* KNOWLES.

April 23.

ASSUMPSIT by the assignees of a bankrupt. The *first* count of the *declaration* was on a contract, dated 12th of *June*, 1833, whereby *Okill* (the bankrupt), agreed to purchase, from the defendant, sixty shares in the *Grand Junction Railway*, at 14*l.* 5*s.* per share, net payment, as follows:—155*l.* on the 15th *June*, 1833, and the remainder on 29th *June*, 1833; in consideration whereof, and that *Okill* promised to accept the shares and pay for the same; the defendant promised *Okill* before his bankruptcy, to deliver and transfer the shares on request; that *Okill*, on 15th *June*, paid the defendant 155*l.* in part and afterwards, and before his bankruptcy, and after 29th *June*, to wit, on 6th *July*, 1833, and on divers other days and times, between that day and the 1st *January*, 1835, paid the defendant divers other sums of money, amounting in the whole to the sum of 585*l.* in part payment of the price of the said sixty shares, which the defendant accepted, and waived the payment of the remainder; that although the defendant delivered thirty-five shares, and *Okill before his bankruptcy, and the plaintiffs, as his assignees, since his bankruptcy, were always ready and willing to pay the remainder of the price*, together with all calls made in respect of the shares, and the plaintiffs, as assignees, afterwards, and after the bankruptcy, to wit, on 11th *January*,

In an action by assignees of a bankrupt for breach of contract, in not delivering railway shares, the plaintiffs alleged in their first count, that the bankrupt, before his bankruptcy, and his assignees since, were ready and willing to pay for the shares; it was proved that the bankrupt was insolvent before his bankruptcy, and that after the bankruptcy there were no assets:—*Held*, that this was sufficient for the jury to infer that the bankrupt and his assignees had not been ready and willing to pay.

The plaintiffs in their second count alleged readiness and willingness to adopt a contract which was to be performed on 1st *July*, 1835; but it appeared that no steps were taken by them till *January*, 1838:—*Held*,—That the length of time was unreasonable, and abandonment of the contract might be inferred.

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1838, tendered the residue, together with the amount paid for calls, &c. yet the defendant did not deliver, &c.

Second count, on a contract dated 1st *July*, 1834, for the sale by the defendant to *Okill*, of fifty shares, at 10*l*. *premium*, averring that, in consideration that *Okill* would purchase the shares, and accept the same, on 1st *July*, 1835, and would allow the defendant interest upon such calls as should be paid before that time, the defendant undertook and promised *Okill* to deliver him the said fifty shares on 1st *July*, 1835; and stating the bankruptcy of *Okill* on 3d *February*, 1835, and that *the plaintiffs*, as assignees, *were always*, on and after said 1st *July*, 1835, *ready and willing to pay* the defendant for the said shares, after the rate aforesaid, with interest upon calls, paid from 1st *July*, 1834; and afterwards, to wit, on 11th *January*, 1838, tendered the moneys due, but that the defendant did not deliver the fifty shares.

There were also counts for money had and received, and on an account stated.

Pleas.—First, *non-assumpsit* to the whole declaration.

Second, *to the first count*, traverse of the payment by *Okill*, and of the acceptance and receipt by the defendant of the several sums, in the first count mentioned, in part payment, and of the waiver of payment of the remainder.

Third, to the same, traverse of the allegation, that *Okill*, before his bankruptcy, and the plaintiffs, as his assignees afterwards, *were ready and willing to pay* the remainder of the price, together with all sums paid for calls.

Fourth, to the same, that the alleged tender was made at an unreasonable time after the alleged waiver, and that neither *Okill*, or the plaintiffs, within a reasonable time, after the alleged waiver were ready and willing to pay the remainder of the price, and did not tender the same within a reasonable time after the waiver, or after the 29th *June*, 1833—*verification*.

Fifth, to the same, that after the making of the promises in that count mentioned, and payment and delivery of the shares in part performance, and waiver by the defendant of the remainder of the price, and before the bankruptcy of *Okill*, mutual promises were made by *Okill* and the defendant not to require further performance, and a mutual agreement thereupon to abandon the contract—*verification*.

Sixth, to the same, that the plaintiffs, as assignees, did not, at the bankruptcy of *Okill*, or for a long time, to wit, six months, or in any reasonable time after the bankruptcy, adopt the contract, but declined so to do;—averment of mutual promises between plaintiffs and defendant, dispensing with further performance—*verification*.

Seventh, *to the second count*, traverse of the allegation, that plaintiffs, as assignees, were ready and willing to pay defendant for the shares, and made the tender, or requested defendant to deliver the shares.

Eighth, to the same, that the alleged tender was made at an unreasonable time, and at a time unreasonably long, after the 1st *July*, 1835, and that neither the plaintiffs nor any other persons were within a reasonable time after the said 1st *July*, 1835, ready and willing to pay, nor did they tender, within a reasonable time after that day—*verification*.

Ninth, to the same, *that the plaintiffs*, as assignees, *did not adopt the contract within a reasonable time after the bankruptcy*, and that the contract was mutually abandoned—*verification*.

Tenth, to the same, that after the thirty-five shares had been delivered to

the plaintiffs, and whilst 115*l.* were due to the defendant, and before *Okill's* bankruptcy, to wit, on 17th *January*, 1834, the defendant agreed to give *Okill* further time until the acceptance thereinafter mentioned, should become due—that the defendant would lend *Okill* a further sum, to wit, 285*l.*—that *Okill* should give the defendant his acceptance for 400*l.*—that the defendant should hold the remainder of the said shares till *Okill's* acceptance became due—and that if the acceptance was not paid, the defendant should be at liberty to sell the shares;—*averment*, that the defendant did give further time, and did lend *Okill* 285*l.*, and that *Okill* gave his acceptance for 400*l.* and made default, whereupon defendant sold the remainder of the shares, according to agreement—*verification*.

Eleventh, traverse of *Okill's* bankruptcy.

At the trial before *Coleridge*, J., at the Spring Assizes for *Liverpool*, 1838, the following facts appeared;—(the bankrupt himself being the principal witness.)

Okill, the bankrupt, for many years before his bankruptcy, carried on the business of a share-broker at *Liverpool*, and in the course of his business he had many transactions with the defendant in railway shares. Amongst them were the two contracts set forth in the pleadings. The sixty shares in the first contract were not paid for by the bankrupt, on the 20th of *June*, 1833, according to the stipulation, and it being inconvenient for him to pay the amount, the defendant granted him time at different periods, that is to say, on the 29th of *August*, 1833, having received the sum of 275*l.* he delivered thirty-five shares, and agreed to give time, until the *January* following, for the payment of the balance on the remaining twenty-five. At that time the bankrupt could not pay the balance of 115*l.* and interest, and the defendant agreed not only to lend him 285*l.* but to give him till *January*, 1835, to make good the balance due on the twenty-five shares, he giving his acceptance at twelve months, for 400*l.* the amount of the two sums, provided that if the bill were dishonoured, the defendant should be at liberty to sell the shares, and reimburse himself. The bill was dishonoured, and on the 3d *February*, 1835, a fiat of bankruptcy issued against him (*Okill*). The plaintiffs were appointed assignees on the 23d *February*, and on the 22d of *May* following the bankrupt received his certificate. On the second contract, on which the shares were not delivered till 1st *July*, 1835, five months after the bankruptcy, no tender was made by the defendant, nor any notice given to him by the plaintiffs, that they were ready to perform the contract on their parts, and should require performance on his.

In *October*, 1835, (the premium on the *Grand Junction* shares having in the mean time advanced to 30*l.* per share), the assignees signified their willingness to perform the contract—but nothing was done till *February*, 1839, when the defendant's attorney was called on to admit that the purchase money, with interest, upon the two contracts, had been tendered to the defendant. This was refused, and in *January*, 1838, the defendant received the following letter from the plaintiffs' attornies—"We are again requested by the assignees of *W. Okill*, a bankrupt, to write to you for the twenty-five shares, being the residue of the sixty shares in the *Grand Junction Railway Company*, sold by you to the bankrupt, on the 12th *June*, 1833, and remaining yet undelivered; and also for fifty other shares in the said railway, sold by you to the bankrupt, on the 1st *July*, 1834. We beg to state that the assignees are

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Shortly afterwards (10th *January*), the sum of 2,777*l.* 4*s.* 1*d.* was tendered as the amount due on the premium, calls and interest for the twenty-five shares, and 5,748*l.* 4*s.* 8*d.* for the fifty shares. This was refused, and the action was brought.

Several calls had been made between the time of entering into the contracts, and the tender, none of which were met by the bankrupt or his assignees, the latter having no assets to enable them to do so; and by the Railway Act, all shares, the calls on which are not paid within a limited time are forfeited.

The particulars of demand claimed 2,188*l.* 15*s.* 11*d.* in respect of the shares under the first contract, and 5,651*l.* 15*s.* 4*d.* in respect of those in the second.

The learned judge left it to the jury to say whether it might not be inferred that the contracts were abandoned altogether.

There was a verdict for the plaintiffs on the two first issues, and for the defendants on the remainder.

Cresswell, Q.C. had obtained a rule *nisi* for a new trial, on the ground of misdirection, and that the verdict was against evidence; and for entering up judgment, *non obstante veredicto*, on the issues raised on the fourth and eighth pleas, contending that reasonableness of time was a question of law, and that a tender made within six years after the contract had been entered into, was in reasonable time.

Wilde, Serjt., *Alexander*, Q.C., *Crompton* and *Knowles*, showed cause.—The assignees should have adopted the contracts at once, and the length of time which they suffered to elapse without doing so, was sufficient to induce the jury to conclude that they had not adopted them. If reasonableness of time is a point of law, the direction of the judge was correct. *Gomery* v. *Bond* (*a*). The statute of limitations cannot have any application. In this case time was of the essence of the contract, as in *Doloret* v. *Rothschild* (*b*), recognised in *Rothschild* v. *Hennings* (*c*), where time was held to be of the essence of the contract, where the subject of the contract is of such a nature as to be exposed to a daily variation of value. No stock is of a more variable nature than that which is the subject of this action. The value of the shares has been increased by a fluctuation in the market. The same principle as to reasonableness of time is laid down in *Ellis* v. *Thompson* (*d*), and in *Sugden's Vendors and Purchasers*, p. 341. 6th edit. It was clear from the evidence that both parties understood that the contracts should be abandoned, until the rise in the shares made it a matter of consequence to the plaintiffs to recover them. The plaintiffs were bound to show that they were *at all times* ready and willing to pay for the shares. *Mason* v. *Corder* (*e*). The denial of the abandonment of the contract depended on the evidence of the bankrupt himself, and the Court will not grant a new trial if the jury doubted his credibility. *Lacey* v. *Forrester* (*f*). In the absence of direct evidence of the abandonment of the contract, it may be inferred from the circumstances of the case. *Palmer* v.

(*a*) 3 M. & S. 378.
(*b*) 1 Sim. & Stu. 590.
(*c*) 9 B. & C. 470. Reversing S. C. *nom. Hennings* v. *Rothschild*, 4 Bing. 314; 12 Moo. 559.
(*d*) 3 M. & W. 445.
(*e*) 7 Taunt. 9.
(*f*) 2 C. M. & R. 59; 3 D. P. C. 668.

Temple (*g*). (It was admitted that the plaintiffs were entitled to the verdict on the first, second, tenth and eleventh pleas.)

Cresswell and *Wightman* in support of the rule.—When a tender is pleaded it is usual to aver that the party was always ready and willing to pay, and offered and tendered the money on a particular day; and it it sufficient to show that *at that time* he was ready. Mere insolvency would not be evidence of want of readiness to pay, as payment might be made by the assistance of friends. The defendant never called on either the bankrupt or the plaintiffs to perform the contract. The cases cited, as to time being of the essence of the contract, have no application. In *Doloret* v. *Rothschild*, there was a time fixed for the performances, and a stipulation, that unless the money was paid then, the deposit should be forfeited. Here there is no time specified. Besides, the principles which guide Courts of Equity as to specific performances, are very different from those at law. The discussions in which questions of time have arisen are principally those of insurance, where it is material that vessels should sail at particular seasons; and time is there the essence of the contract, as the risk is increased or diminished according to the season. Reasonableness of time is, however, a question of law. The principle is the same as in the case of the notice of dishonour of a bill of exchange, where the Courts have laid down what shall be considered a reasonable time. *Tindal* v. *Brown* (*h*), *Darbishire* v. *Parker* (*i*). At all events, the claim of the plaintiffs to the sum of 240*l.* upon the count for money had and received cannot be disputed, otherwise the defendant would retain both shares and money.

TINDAL, C. J.—This case, it appears to me, may be decided on a ground not so wide as that taken in the argument. If any of the pleas form a satisfactory answer to the action we cannot send the cause down to a new trial. I think the issues on the third plea to the first count, and the ninth plea to the second count, have been properly found by the jury.

The action was brought on an agreement for the sale of sixty shares in the *Grand Junction Railway*, at 14*l.* 5*s.* a share. A particular day was named for the delivery of the shares. The declaration then states, that although the bankrupt, before his bankruptcy, and the plaintiffs, as assignees, were always ready and willing to pay the price of the remainder of the shares, together with all calls, &c. and that the plaintiffs, as assignees, after the bankruptcy, tendered the residue, &c. yet the defendant did not deliver the twenty-five shares. This averment was necessary, and a distinct issue is raised on it by the third plea. The defendant had a right, by the agreement, to hold the shares until the calls were paid. Was the evidence, therefore, sufficient to warrant the finding of the jury? It appears that in *January*, 1834, *Okill* borrowed 285*l.* from the defendants, to enable him to pay calls on the thirty-five shares, giving them his acceptance for 400*l.* which was dishonoured. It seems to me this is sufficient to show, he was not always ready and willing to pay for the shares; and as the third plea furnishes a good answer to the action, both in fact and law, it is unnecessary to say whether the remaining pleas were established, and we cannot give a new trial.

(*g*) 1 Har. & Wol. 702; 6 N. & M. 159.
(*h*) 1 T. R. 167.
(*i*) 6 East, 3.

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The ninth plea is also an answer to the action. It avers that the plaintiffs, as assignees, did not demand the performance of the contract *within a reasonable time*, and avers a mutual agreement to abandon it. Here again the question is, whether there was sufficient evidence to support this plea. The contract was to be performed on 1st *July*, 1835. On the 3d *February Okill* became a bankrupt. A considerable time then intervened before a performance of the contract was required. It was certainly not necessary that the assignees should adopt the contract at once: but they were bound to do so in a reasonable time. In the case of a lease the assignees are required to elect whether or not they will take it, in a reasonable time—and ten days has been considered a reasonable time for such purpose. *Ex parte Scott* (*k*). Without laying down a general rule as to the time which may or may not be reasonable, I think it was not reasonable here. From *July*, 1835, till *October*, 1836, nothing was done, and even no result followed from the attempt at negociation which then took place. In *February*, 1837, the defendant is asked to admit a tender, which he refuses to do. Nothing further takes place till *January*, 1838, when the action was brought. The interval between the first and last dates is long enough to warrant the jury in concluding that the contract was abandoned, and I think the verdict was right.

As to the claim of 240*l.*, as that sum is not included in the bill of particulars, and was not mentioned when the rule was moved for, we are not called on to decide that point at present.

BOSANQUET, J.—I am of the same opinion. The whole question is, whether the verdict is on an issue that goes to the whole cause of action. The third plea traverses the allegation of readiness and willingness. It has been contended that there should be distinct proof of demand and refusal. In ordinary cases solvency may cause a presumption, that a man is ready and willing to fulfil an agreement; but it may depend also on many circumstances. Here the party was not only unwilling, but unable. Incapacity is cogent proof of want of readiness. When a man is incapable of doing an act, he cannot be said to be ready to do it. In this case there was abundant proof to show that the bankrupt was incapable—and the assignees had no assets to enable them to perform the contract.

I think also that the ninth plea was sustained by the evidence. It is not necessary that a parol contract should be discharged by actual words or writing. It may be discharged by a mutual understanding between the parties, and by their relative situations. Here the bankrupt was under considerable obligations, and the assignees might either decline or agree to adopt them; but they were bound, if they intended to preserve a right of action, to make their election in a reasonable time. It cannot be said the time was reasonable here.

The sum of 240*l.* not being in the particulars of demand, we cannot come to any decision about it.

COLTMAN and ERSKINE, JJ.—Of the same opinion.

Rule discharged.

(*k*) 1 Rose, 446 n.

CROOTS *v.* LONGDEN.

Common Pleas.

April 23.

A return to a writ of false judgment in the County Court, that the defendant had not given security to prosecute his suit:—*Held*, insufficient, and quashed but without costs.

The 6th section of 19 Geo. 3, c. 70, refers to cases removed from inferior Courts before judgment.

THIS was an action commenced by *justicies* in the *County Court* of *York*.—Judgment was obtained for the plaintiff. A writ of false judgment had been issued by the defendant, commencing in the usual form: viz., "If *William Longden* shall give you security to prosecute his suit, then, &c.;" to which the sheriff returned as follows:—"The within named *William Longden* hath not given me security to prosecute his suit, whereby I am prevented from causing his said plaint to be recorded, &c."

Erle, Q. C.—had obtained a rule *nisi, to quash this return* for insufficiency, with costs.

W. H. Watson now showed cause, and produced affidavits, that by the practice of the *County Court* of *York*, a defendant issuing a writ of false judgment was always *in fact* required to give security before the plaint was recorded. [*Tindal*, C. J.—Is there any difference between these words in a writ of false judgment and similar expressions in other writs? No security is required in law.]—At any rate the case is within the 19 *Geo.* 3, c. 70 (*a*). *Grimshaw* v. *Emerson* (*b*) is an authority to show that the sixth section applies to Courts not of Record.—[*Tindal*, C. J.—What necessity is there for security? no costs are allowed on a writ of false judgment. In the case cited, the cause below had arrived at judgment. The fact of this being a case after judgment is of no consequence, for the section applies to cases after as well as before judgment.]

Erle in support of the rule.—The 5th section of the Act is expressly limited to Courts of Record, and the 6th is also by inference; for the defendant is bound to enter into a recognizance; and that is an obligation of record. It

(*a*) Sec. 4, enacts, that "the record of final judgment in any inferior Court may be removed into one of the superior Courts at *Westminster*, and that writs of execution may be issued to the sheriff of any county, &c." Sec. 5, provides, "that no execution shall be stayed or delayed, upon or by any writ of error or *supersedeas* thereon, to be served for the reversing of any judgment given or to be given in any inferior Court of Record, where the damages are under 10*l.*, unless such persons in whose names or name such writ of error shall be brought, *with two sufficient sureties*, such as the Court, wherein such judgment is or shall be given, shall allow of, shall first before such stay made or *supersedeas* to be awarded, be bound unto the party for whom any such judgment is or shall be given by recognizance, to be acknowledged in the same Court, in double the sum adjudged to be recovered by the said former judgment; to prosecute the said writ of error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the said writ of error be non-prossed) all and singular the debts, damages and costs adjudged, or to be adjudged, and all costs and damages to be awarded for the same delaying of execution." Sec. 6, enacts, "that no cause, where the cause of action shall not amount to the sum of 10*l.* or upwards, shall be removed or removable into any superior Court, by any writ of *habeas corpus* or otherwise, unless the defendant, who shall be desirous of removing such cause, *shall enter into the like recognizance* for payment of the debt and costs, *in case judgment shall pass against him.*"

(*b*) 1 D. P. C. 337.

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also prohibits the removal of the cause by *habeas corpus;* and that is a writ applicable only to Courts of Record. *Mitchell* v. *Mitchinham (c.)*

TINDAL, C. J.—I am of opinion that this case does not fall within the 19 Geo. 3, c. 70. The 4th, 5th and 6th sections all refer to the same subject, viz., actions for less sums than 10*l.* brought in inferior Courts of Record; the 4th enacts, that the record of the judgment may be removed to the superior Courts, and writs of execution may be issued to the sheriff of any county; the 5th specifies the conditions on which execution shall be stayed; and the 6th takes up the case where judgment is not given. That this is the meaning of the clause, appears to me from the provision, that the defendant shall enter into a recognizance "*in case judgment shall pass against him.*" These words clearly point to a case where judgment is not given; and therefore, I think, *Grimshaw* v. *Emerson* is not applicable. The rule for quashing the return must be absolute, but without costs, and the sheriff may have a week to make a better return.

BOSANQUET, J.—I am of the same opinion; the 6th section clearly applies only to cases removed before judgment.

COLTMAN, J.—I am of the same opinion. It was not, I think, the intention of the statute to throw any impediment in the way of suing out the writ of false judgment, or it would have been expressed in one of the sections. The 6th section is applicable only to causes removed before judgment.

ERSKINE, J., concurred.

Rule absolute without Costs.

(*c*) 1 B. & C. 513. 2 D. & R. 722.

April 15.

COOPER *v.* TALBOT.

Where a rule *nisi* for a nonsuit had been obtained upon an affidavit, in the title of which the plaintiff's Christian name was misstated, the Court allowed the affidavit to be amended and re-sworn upon payment of the plaintiff's costs of the day.

GURNEY had obtained a rule *nisi* last term to enter a nonsuit in this case.

Ballantine took a preliminary objection, that, in the heading of the *affidavit* upon which the rule had been obtained, the plaintiff was called *James Cooper*, whereas the name by which he had declared was *Edmund*. He cited *Phillips* v. *Hutchinson* (*a*).

TINDAL, C. J.—It would be a hard measure of justice that a party should lose his rights by so mere a mistake. The affidavit may be amended and re-sworn upon payment of the plaintiff's costs of appearing here to-day.

Per Curiam

Rule accordingly.

[The amendment being made, the rule was made absolute for a nonsuit the next day.]

(*a*) 3 D. P. C. 20.

HILTON *v.* SWANN.

Common Pleas

April 24.

TROVER for a bill of exchange dated 20th *December*, 1837, drawn by *W. Powell* on and accepted by *W. Hilton*, payable to the order of the drawer at three months.

Third *plea*, That before and *at the time of the supposed conversion* of the bill in the declaration mentioned, *the plaintiff being possessed of the said bill* before it became due and payable indorsed the same to the defendant for a valuable consideration, by means whereof *the defendant* then *became* and was *the holder of the said bill, and continued such holder* until and *at the time of the supposed conversion—verification.*

Fourth, that after the drawing and accepting of the said bill and after it had been indorsed by *W. Powell* to the plaintiff, and before the said bill became due and payable according to the tenor and effect thereof, and whilst the said bill was in the possession of the plaintiff, she (the plaintiff) indorsed the same in blank, and before and at the time of the said supposed conversion by the defendant, one *Rawlins* was by virtue of such last-mentioned indorsement the holder, and was possessed of the said bill with such indorsement thereof of and by the plaintiff in blank as aforesaid, and afterwards and before the said bill became due and payable according to the tenor and effect thereof, to wit, on the 16th *January*, 1838, the said *Rawlins* so being the holder and in possession of the said bill, offered to deposit the same in the hands of the defendant as a security for the payment of a certain sum of money, to wit, 35*l.* then due and owing by the said *Rawlins* to the defendant, and the defendant being satisfied as to the credit and responsibility of the drawer and acceptor thereof, and of the plaintiff as such indorser, and the defendant also then believing, and still believing, that the said *Rawlins* was lawfully possessed of the said bill, and had good and sufficient right, title, power and authority to negociate and otherwise dispose of the said bill, and to lodge and deposit the said bill with the defendant and to deliver the same to him, and the defendant *not* then *knowing* nor yet knowing *the contrary thereof*, afterwards and before the bill became due and payable according to the tenor and effect thereof, to wit, on the day and year aforesaid, took and received from *Rawlins* the bill as such pledge and deposit to be by the defendant kept and retained until the said sum of 35*l.* should be repaid and satisfied, and to secure the repayment thereof, by means of which said several premises the defendant then became and was the lawful holder of the said bill, and continued such holder thereof, until and at the time of the said supposed conversion thereof in the declaration mentioned, and the said 35*l.* has not at any time before the commencement of this suit been repaid to the defendant, but still remains and is wholly due and unpaid to him—*verification.*

Special *demurrer* to the third plea on the ground that it was repugnant, and

To *trover* for a bill of exchange, a plea that before and *at the time of the supposed conversion* the plaintiff *being possessed* of the bill indorsed it to the defendant, who continued holder of the bill until and *at the time* of the supposed conversion:—*Held*, bad for repugnancy.

A further plea alleged that the plaintiff being possessed of the bill, indorsed it in blank, that by virtue of such indorsement one *R.* became the holder, from whom the defendant took it as a pledge for an existing debt, *believing* that *R.* was lawfully possessed of the bill and had authority to deposit it. *Replication*, that the defendant had notice, and well knew at the time of receiving the bill that *R.* had no authority to deposit it, and concluding to the country:—*Held*, good as

traversing a material allegation in the plea.

Query, whether the plea was not bad as not showing any authority in *R.* to pledge the bill.

Query, also, whether it was not bad for *duplicity*, inasmuch as if the allegation were to be taken to mean that *R. had* authority to pledge the bill, it would be uncertain whether the defendant relied on the delivery of the bill to him by *R.*, as the lawful holder, or upon his (the defendant's) own *primâ facie* title, by reason of the transfer, without notice of any want of title in *R.*

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contained allegations at variance and inconsistent with each other in alleging that two different persons were holders of the bill at the time of the conversion —*joinder*.

Replication to the fourth plea: That at the time of the defendant's so taking and receiving from *Rawlins* the bill of exchange as in that plea mentioned, the defendant had notice, and then *well knew* that *Rawlins* had not good or sufficient right or authority to lodge and deposit the bill with the defendant as such pledge and deposit to be by him kept until the said 35*l.* should be repaid and satisfied to secure the repayment thereof—conclusion *to the country*.

Demurrer to the replication to the fourth plea, on the ground that the issue tendered by the replication was immaterial, there being no averment that *Rawlins* had not good title to the bill and power to dispose of the same—*joinder*.

Stephen, Serjt. in support of the demurrer to the third plea, was stopped by the Court.

Hoggins, in support of the third plea: the allegation at the commencement of the plea certainly is that the plaintiff was possessed of the bill "before *and at the time* of the supposed conversion," but the words, "and at the time of," may be rejected as surplusage, and then the former part of the plea is not inconsistent with the latter, which states that the defendant was the holder of the bill at the time of the conversion. [*The Court*, however, expressed a decided opinion that the plea in question could not be supported.] Then as to the replication to the fourth plea. It attempts to put in issue that which is immaterial, namely, the notice to, and knowledge of, the defendant that *Rawlins* had not good or sufficient authority to deposit the bill with him, whereas the material allegation in the bill is the *fact* that *Rawlins* had such authority, and that *fact* should have been traversed.

Stephen, Serjt. in support of the replication.—The issue taken on the plea as it stands is proper, for it could not be taken in any other mode. The allegation in the plea of the defendant's not knowing that *Rawlins* had no authority to deposit the bill is material, upon the principle that a *bonâ fide* holder of a negotiable instrument, without notice of the want of title in the party transferring it, is not affected thereby. The allegation that the defendant knew *Rawlins* had no authority to deposit the bill, implies that he had none, *Jones* v. *Winckworth* (*a*); and it was not necessary that the plaintiff should aver that *Rawlins* had no such authority, inasmuch as it appears by the plea that the bill had been indorsed in blank, and that would not transfer the property in a bill made payable *to order* like the present. *Lucas* v. *Haynes* (*b*). Com. Dig. tit. *Action upon the case upon Trover* (B.) If this replication be not a good answer to the plea, the plea itself is bad. It alleges that *Rawlins* was the holder of the bill, but it is not said that he is the *lawful* holder, and it is by no means inconsistent with the allegation that *Rawlins* might have obtained it in an improper manner. *De La Chaumette* v. *the Bank of England* (*c*),

(*a*) Hardr. 111.
(*b*) 1 Salk. 130.
(*c*) 9 B. & C. 208.

Haynes v. *Foster* (*d*), *Evans* v. *Kymer* (*e*), *Treuttel* v. *Barandon* (*f*), *Fancourt* v. *Bull* (*g*), *Anonymous* (*h*), *Collins* v. *Martin* (*i*), *Jaulerry* v. *Britten* (*k*).

Hoggins, in reply, contended that the statement that the bill was indorsed in blank imported a consideration, and the effect of such an indorsement was to make the bill payable to bearer (*l*).

TINDAL, C. J.—The plaintiff must have judgment on the demurrer to the replication. I confess I have great doubt as to the fourth plea itself. It is very arguable whether it is not bad in substance. It does not allege any authority in *Rawlins* to pledge the bill. But it is not necessary to consider this point, as it is sufficient that the replication has taken issue on a material allegation. The allegation in the plea is, that *Rawlins* was, by virtue of the plaintiff's indorsement the holder of the bill, it does not say that he was the *lawful* holder. Now if the allegation is to be taken to mean that *Rawlins was* the lawful holder this would be a good answer, as in that case he would have had authority to pledge the bill; but then the plea would contain a further answer, viz.—the belief of the defendant that *Rawlins* was lawfully possessed of the bill, and had authority to dispose of it, and in this belief took the bill as a pledge and security for a previous debt. The plea would, therefore, be double, inasmuch as it would be uncertain whether the defendant relied on the delivery of the bill by *Rawlins* as the lawful holder, or on his (the defendant's) *primâ facie* title, arising from the transfer to him without notice of the feebleness of *Rawlins'* title. But we are not to construe the plea as double if it can be construed in another manner; and it *appears* to me it *can* be so construed, inasmuch as the first allegation may be taken to mean that *Rawlins* had *primâ facie* a good title to the bill; and then the real question raised by the plea would be, whether the defendant had notice of *Rawlins'* want of title. This would be a question of fact, and this, it appears to me, was properly put in issue by the replication. Construing the plea, therefore, most beneficially for the defendant, it has made this knowledge on his part a material allegation, and the replication, therefore, has taken a proper issue.

BOSANQUET, J.—I am of the same opinion. The fourth plea is in confession and avoidance. It does not profess to be a denial of the conversion, or of the plaintiff's title, but it alleges as matter of excuse the defendant's want of notice of the defectiveness of *Rawlins'* title. This want of notice was traversable, as the very matter of excuse alleged by the defendant, and the replication has properly traversed it accordingly.

COLTMAN, J.—I am of the same opinion. The replication traverses the only material allegation in the plea, unless we so construe it so as to make it bad for duplicity.

ERSKINE, J.—of the same opinion.

Judgment for the plaintiff.

(*d*) 2 C. & M. 237; 4 Tyrw. 67.
(*e*) 1 B. & Ad. 528.
(*f*) 8 Taunt. 100.
(*g*) 1 Hodg. 98; 1 New Cases, 682; 1 Scott, 645.
(*h*) 1 Salk. 126.
(*i*) 1 B. & P. 648.
(*k*) *Ante* vol. 1, p. 58; 4 New Cases, 242; 5 Scott, 655.
(*l*) See *Francis v. Mott*, Doug. 633; *Peacock v. Rhodes*, id. 633.

Common Pleas.

May 3.

A verdict and judgment against a defendant on a plea of set-off operate as an estoppel in any other action brought by him for the same demand.

EASTMURE *v.* LAWES.

DEBT for 30*l.* money had and received, and an account stated.

Plea to the first count; that the plaintiff ought not to be admitted to say that she the defendant was indebted to him upon the said causes of action therein mentioned, because heretofore to wit, &c., she, the defendant, impleaded the plaintiff in an action on promises in Her Majesty's Court of *Exchequer of Pleas* at *Westminster*, and afterwards, to wit, &c., she declared in the said action, and in her declaration, the now defendant, according to the course and practice of the said Court, &c., therein complained that the now plaintiff was indebted to her the now defendant, in the respective sums of 200*l.*, &c. for and upon the consideration therein mentioned. And afterwards, to wit, &c., the now plaintiff by his attorney, amongst other pleas pleaded in the said action, as to the said causes of action in the said declaration mentioned, except 50*l.*, part thereof, that the now defendant, before and at the time of the commencement of the said action in the said Court of *Exchequer of Pleas*, and at the time of pleading the said pleas, was indebted to the now plaintiff in 250*l.* for money had and received by the now defendant, to the use of the now plaintiff, and that he the now plaintiff was ready and willing, and he did, by his said plea, offer to set off and allow to the now defendant, out of the said last-mentioned sum of money, the full amount of damages in the said action, part of which said last-mentioned sum of money so pleaded in the said action by the now plaintiff, by way of set-off, was the identical sum of money in the said now plaintiff's declaration mentioned, and for which the now plaintiff hath impleaded the defendant, and the defendant further saith that afterwards, to wit, &c., the now defendant, by way of replication to the said plea of set-off of the now plaintiff, replied that she, the now defendant, was not indebted to the now plaintiff, in manner and form as the now plaintiff in his said plea of set-off alleged, and thereupon issue was joined between the said parties, and such proceedings were thereupon afterwards, to wit, &c., had, that the jurors of the jury being summoned in the said action, and having come to speak the truth of the matters in issue in the said action, and being chosen, tried and sworn, did, as to the said issue, upon the said plea of set-off, say upon their oath, that the said now defendant was not indebted to the said now plaintiff, in manner and form as the now plaintiff in his said plea of set-off alleged, and afterwards, to wit, &c., the now defendant, by the consideration and judgment of the said Court; recovered in the said action against the now plaintiff, 97*l.* 8*s.* for her damages, which she, the now defendant, had sustained, as well on occasion of the not performing of the said promises in her, the said now defendant's, declaration mentioned, as for her costs and charges by her in that behalf expended, whereof the now plaintiff was convicted *prout patet*, &c.; which said judgment still remains in full force and effect, not in the least reversed or made void :—*verification* by the record. Wherefore she, the defendant, prays judgment, if the plaintiff ought to be admitted to say, that the defendant is indebted to him upon the consideration and cause of action, in the first count of the declaration mentioned.

Replication.—That the plaintiff ought to be admitted to say that the defendant is indebted to him upon the said causes of action in the first count mentioned, because he, the plaintiff, says, that although *true it is* that the defendant impleaded him the now plaintiff, in the said action, in the plea mentioned, in manner and form, &c., and that he, the now plaintiff, did in the said action plead (amongst other pleas) that she, the now defendant, was indebted to him in the said several sums of money therein mentioned, and that he was ready and willing, and did by his said plea offer to set off and allow to her out of those sums of money, the full amount of her damages in the said action, and *that part of the said sums of money so pleaded in the said action by way of set-off, was the identical sum of money in the said now plaintiff's declaration mentioned,* and for which he had impleaded the now defendant; and although true it is that the now defendant did reply to the said plea of the now plaintiff, as in the plea of the now defendant is alleged, and that the jury summoned in the said action, did say as to the said issue, upon the said plea of set-off, that the said now defendant was not indebted to the said now plaintiff, in manner and form as in the said plea of set-off was alleged; yet the plaintiff says that the said jurors of the jury aforesaid did say so, because he the now plaintiff did not at the trial of the said action, give or offer to the jurors of the jury aforesaid, any evidence whatever in support of his said plea of set-off, nor was prepared nor did he seek at the said trial to substantiate, or in any way to sustain the said plea, or to prove that the said several sums of money therein mentioned were due and owing, by her the defendant, to him the plaintiff, as was in that plea alleged; nevertheless the plaintiff says that those several sums of money were at the time of the said trial, and still are, and each of them is due and owing to him, from the defendant, and have never been in any way paid, satisfied or discharged:—*Verification;* wherefore the plaintiff says that he ought to be admitted, &c., and he prays judgment, and his debt aforesaid, together with his damages, &c.

Special Demurrer.—Assigning for causes, that the matters alleged in the replication did not confess and avoid the plea, nor prevent the estoppel which the defendant had pleaded; and that the matters pleaded, if true, would be only an equitable, and not a legal answer to the plea, &c.—*Joinder.*

Theobald, in support of the demurrer.—The declaration states the action to be for recovery of a debt, which was the subject of a set-off in a former action; the verdict and judgment obtained for the plaintiff in that action is now pleaded by way of estoppel, and the replication is that there was no evidence of the set-off offered at the trial, and therefore the plaintiff failed to establish his case. The replication does not meet the estoppel. All the cases in which a verdict is not matter of estoppel, are to be found in *Com. Dig.* tit. *Estoppel (E.)* but none of them applies to the present case.—[*Tindal,* C. J.—May it not be said that a verdict and judgment against a defendant, on a plea of set-off, operate in the same manner as a non-suit?]—A set-off is in effect a statutory plea of payment, and a verdict on such a plea would surely have operated as an estoppel. In *Marriott* v. *Hampton,* (*a*) it was held that money paid under compulsion of legal process, although afterwards discovered not to be due, could not be recovered back in an action for money had and received. The

(*a*) 7 T. R. 269; 2 Esp. 546.

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same principle is acknowledged in *Hamlet* v. *Richardson* (*b*). The defendant in the former action, might have applied for a new trial, if injustice had been done to him by the verdict. The replication here is consistent with the fact of evidence to negative the set-off having been offered to the jury by the then plaintiff.

C. Jones in support of the replication.—A defendant will be in a worse situation than a plaintiff, if a judgment against him on a plea of set-off is, in all cases, to operate as an estoppel. A plaintiff may elect to be non-suited, or he may withdraw the record if he has not sufficient evidence to support his claim, but a defendant has no such alternative.—[*Tindal*, C. J.—The defendant, if he found it necessary, might have withdrawn his plea, by applying to a judge at chambers, or at the trial.]—The effect of a verdict against a defendant on a plea of set-off is only to show that the defendant has not made out his claim to the full amount; it cannot, therefore, operate as an *estoppel* to the whole amount.—[*Tindal*, C. J.—In *Cousins* v. *Paddon* (*c*) it was held that a plea of set-off may be taken distributively.]—It was decided otherwise in *Moore* v. *Butlin*. (*d*)—[*Bosanquet*, J. referred to *Laing* v. *Chatham* (*e*).]—In *Ravee* v. *Farmer* (*f*), it was held that an award made upon all matters in difference between the parties did not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred to; here the claim under the set-off was not in fact adjudicated upon, in the former action, inasmuch as the defendant gave no evidence of it.—[*Tindal*, C. J.—In *Ravee* v. *Farmer*, the question as to estoppel did not arise: that is the difficulty here.—*Bosanquet*, J.—*Hennell* v. *Fairlamb* (*g*) seems in point, where it was held that a party cannot bring an action for what has been the subject of a set-off in a former action by the defendant against him; but if the set-off was more than sufficient to cover the demand in the former action, he may maintain an action for the surplus.] The cases of *Seddon* v. *Tutop* (*h*), *Golightly* v. *Jellicko* (*i*), *Lord Bayot* v. *Williams* (*j*), and *Hadley* v. *Green* (*k*), all furnish analogies in favour of the plaintiff. In *Heming* v. *Wilton* (*l*), an attorney had brought a previous action for business done, and for money lent, but only recovered a small sum for the latter demand, as no bill had been delivered pursuant to the statute, he was, nevertheless, held entitled to bring a second action in respect of the same business: suppose the plaintiff there had been a defendant in the first action, and had pleaded a set-off for business done, and had failed to establish his set-off by want of proof of having delivered the bill; would he have been barred from bringing an action for the business, when he was in a situation to prove the delivery of the bill? The cases of *Thorpe* v. *Cooper* (*m*) and *Godson* v. *Smith* (*n*), are also in point.

(*b*) 9 Bing. 644; 2 Mo. & Sc. 811. See also 2 Smith Lead. Ca. 237, *et seq.*
(*c*) 1 Gale. 305; 2 C. M. & R. 547; 5 Tyr. 535; 4 D. P. C. 488.
(*d*) 1 Will. Woll. & Dav. 638; 7 A. & E. 595; 2 N. & P. 436.
(*e*) 1 Camp 252.
(*f*) 4 T. R. 146.
(*g*) 3 Esp. 104.
(*h*) 6 T. R. 607; 1 Esp. 401.
(*i*) Cited 4 T. R. 146.
(*j*) 3 B. & C. 235; 5 D. & R. 87.
(*k*) 2 C. & J. 374; 2 Tyr. 390.
(*l*) 5 C. & P. 54.
(*m*) 5 Bing. 116; 2 M. & P. 245.
(*n*) 2 Moore, 157.

Theobald in reply.—The cases cited on the other side are all distinguishable, for they are all cases where two distinct causes of action were included in the declaration, and the evidence and verdict were confined to one only; but the cause of action in the present case is admitted by the pleadings to be for the identical sum of money which formed the subject of the set-off in the former action. The case of *Ravee* v. *Farmer* must be considered as over-ruled by *Dunn* v. *Murray* (*o*); *Moore* v. *Butlin* was merely a question as to costs.

TINDAL, C. J.—I think the plea in this case is a good one, and that the replication is no answer to it. The defendant pleads a verdict and judgment obtained against the plaintiff in a former action upon the identical cause of action which the plaintiff now sets up. The question therefore is, can a party, against whom a verdict has been found on a distinct issue, bring another suit on the identical cause of action? It is perfectly clear that if the plaintiff had sued for this sum in a former action, and a verdict had passed against him, he could not renew the same matter on the ground that he had not offered evidence to make good his demand. He might have been non-suited, and thus have avoided an estoppel. It is said, however, that a defendant who pleads a set-off is in a situation of greater hardship, because he has no such power of election. But he is not bound to plead such a plea; and if either before or at the trial he is so inclined, he may withdraw it from the record on payment of costs. This, therefore, is a similar power of election to that enjoyed by a plaintiff. Another hardship that it is argued presses on the defendant is, that if he fails to show on a plea of set-off that the debt due to him equals the plaintiff's demand, a verdict must pass against him; but there is in reality no hardship in this, for according to *Moore* v. *Butlin*, the defendant will be entitled to deduct any amount which he can prove to be due, although the verdict upon the issue will be for the plaintiff. We cannot see how an estoppel can be avoided by this replication, consistently with the case of *Outram* v. *Morewood* (*p*), where it was held that if a verdict be found on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, in respect of the same fact or title.

BOSANQUET, J.—I am of the same opinion. I consider the rule to be, that where an issue has been taken on a specific cause of action, a verdict and judgment may always be pleaded by way of estoppel to the same cause of action. It is so here, and it is stated on the record that the demand in this action is identical with that set-off in the former one. The hardship on defendants, which has been alleged in the argument, may certainly operate in some cases, but it is entirely in the defendant's own discretion to plead a set-off, and he may at any time, on application to a judge, or the Court, withdraw it from the record; or he may have the benefit of his set-off, so far as he can prove the amount of his demand.

COLTMAN and ERSKINE, JJ. concurred.

Judgment for the Defendant.

(*o*) 9 B. & C. 780; 4 M. & R. 571.

(*p*) 3 East, 346.

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May 1.

A bill of exchange purported, in the body of it, to be drawn for "two hundred pounds," but the figures at the top were "245*l.*" the stamp was for the larger amount:—*Held*, that, as this was a patent ambiguity, evidence was not admissible to show that it was the intention of the parties to draw the bill for the larger amount;

2nd. That the sum mentioned in words in the body of the bill was that for which it must be taken to be drawn. *(Coltman, J. dissentiente.)*

SANDERSON and others *v.* PIPER and others.

ASSUMPSIT by indorsees against acceptors of a bill of exchange for 245*l.* dated 30th August, 1836, at six months after date.

Plea—That the defendant did not accept the bill.

At the trial the plaintiffs produced a bill of exchange, drawn in the following form:—

"245*l.* London, August 30th, 1836.

"Six months after date, pay to our order two hundred pounds, for value received.

"Per procuration of Thomas Maltby, Son & Co.,
"Henry Maltby.

"To Messrs. H. H. Piper & Co., 42, Eastcheap.

"Accepted, payable at Hankey's, Henry H. Piper & Co.

(Indorsed,) "Thomas Maltby, Son, & Co.

A verdict passed for the plaintiffs for 245*l.* and interest, subject to the opinion of the Court on the following case:—

The plaintiffs are extensive bill-brokers in the city of *London*. It was proved upon the trial that the bill was drawn by *Maltby & Co.*, upon and accepted by the defendants in payment of the sum of 245*l.*, being the contract price of ten tons of lead sold by *Maltby & Co.* to the defendants. The bill was drawn in figures for 245*l.*, but the words "and forty-five" were omitted in the body of the bill by mistake. The bill when drawn was on a 6*s.* stamp, and the defendants, when they accepted it, intended to accept a bill for 245*l.* It was further proved, that the bill was left with the defendants for two or three weeks for their acceptance, and application was made to them three several times for the bill, as a bill for 245*l.*, the usual mode of applying for bills left for acceptance being by the amount as expressed in the figures on the bill, and it was referred to on those occasions by the drawers and the defendants, as a bill for 245*l.* It was also proved, that the usual course of business among extensive bill-brokers in the city is to examine the bills discounted by them by the figures and the stamp, not by reading the body of the bill; and it would be almost impossible, from the number of bills discounted daily, to take them by anything but the figures and stamps. On the 14th January, 1837, the plaintiffs discounted the bill for *Maltby & Co.*, and the plaintiffs paid them 245*l.* less the discount for the same. Before the bill came to maturity, *Maltby & Co.* failed. The defendants upon the trial objected to the admissibility of the evidence of the facts relating to the transaction, in respect of which the bill was drawn, of the intention of the parties, of the circumstances relating to the application for the acceptance, and of the defendant's conduct in regard to them; but the evidence was received, subject to the opinion of the Court upon the inadmissibility of the whole or any part of the same.

The question for the opinion of the Court was, whether upon such of the evidence given at the trial as might be deemed to be admissible, the plaintiffs were entitled to recover in this action either the sum of 245*l.* and interest, or the sum of 200*l.* and interest. If the Court should be of opinion the plaintiffs were entitled to recover either of those sums, a verdict was to be entered accordingly. If the Court should be of opinion that the plaintiffs were not entitled to recover any sum from the defendants, a non-suit was to be entered.

Wilde, Serjt. for the plaintiffs.—The intention of the defendants to accept a bill for 245*l.* is manifest from the amount of the stamp, the value of the goods for which the bill was given, and the general conduct of the parties. The plaintiffs do not seek to vary or contradict the instrument, but only to explain it. If no sum had been mentioned in the body of the bill, it would have been taken to be valid for the amount mentioned in the margin; as in *Rex* v. *Elliot* (*a*), where the prisoner was indicted for the forgery of a 50*l.* note; and it appeared that in the body of the note the promise was only to pay the sum of "fifty," the word "pounds" being omitted, but at the bottom of the note "£50" was engraven, and it was held that the prisoner was properly convicted for forgery. One of the earliest authorities is *Marius* on bills of exchange; it is there laid down (page 32,) "If it so fall out that through unadvisedness, or error of the pen, the figures of the sum and the words at length of the sum that is to be paid upon any bill of exchange do not agree together, either that the figures do mention more and the words less, or that the figures do specify less and the words at length more, in either or in any such like case, you ought to observe and follow the order of the words mentioned at length, and not the figures, *until further order be had concerning the same;* because a man is more apt to commit an error with his pen in writing a figure than he is in writing a word, and also because the figures at the top of a bill do only, as it were, serve as the contents of the bill and a breviat thereof; but the words at length are in the body of the bill of exchange, and are the chief and principal substance thereof, whereunto special regard ought to be had." A similar rule is laid down in *Beawes' Lex Mercatoria*, (p. 456, pl. 193, 5th Ed.) and in *Forbes* on bills of exchange. The principle to be derived from this is, that the drawee is to consider the amount of the bill to be that specified in words, unless there be other circumstances which will undoubtedly prove that contained in the figures to be the correct one. Here every circumstance in the transaction fixed the sum to be 245*l.* This is quite as strong a case for the admissibility of parol evidence to explain apparent ambiguity as *Gibson* v. *Minet* (*b*). In *Knight* v. *Clements* (*c*) it was held that the holder of an instrument in which an alteration had been made, could show by extraneous evidence that it was properly made. *Henman* v. *Dickenson* (*d*) is to the same effect. In many cases evidence has been received for the purpose of throwing light upon contracts. In *Fonnereau* v. *Poyntz* (*e*) evidence of the state of a testatrix's property was admitted, in order to show that, by a parti-

(*a*) 2 East, P. C. 951; 1 Leach. C. C. 175, 179.
(*b*) 1 H. Bl. 569; 3 T. R. 481; 2 Bro. P. C. 48.
(*c*) 1 Will. Woll. & Hodg. 280; 3 N. & P. 375.
(*d*) 5 Bing. 183; 2 M. & P. 289.
(*e*) 1 Bro. C. C. 472.

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cular bequest, she meant sums of money in the long annuities, and not annuities of the amount specified (*f*). In *Beaumont* v. *Fells* (*g*), evidence was admitted to show who was the party intended as legatee. In *Smith* v. *Wilson* (*h*), a lessee of a rabbit warren covenanted to leave 1000 rabbits at the expiration of his term, and evidence was admitted to show that, by the custom of the country, 1200 rabbits went to *a thousand*. The doctrine of ambiguity is often made to bend to custom and usage in mercantile transactions; *Bottomley* v. *Forbes* (*i*). The words of an instrument, also, are always to be construed most strongly against the maker, *Edis* v. *Bury* (*j*).

Peacock, for the defendants.—No evidence is admissible to explain a patent ambiguity, which this clearly is. In *Rex* v. *Elliot* there was no variance between the body of the bill and the superscription. The word "pounds" was omitted in the body by mistake, and the letter "£," in the margin, was admitted to explain the body just as the venue in the margin of a declaration is referred to for the purpose of assisting, but not of contradicting, the venue in the body of a declaration. No argument can be derived from the stamp, for the same principle which excludes evidence in explanation excludes the consideration of the stamp. The stamp is never used for ascertaining whether an instrument is a lease, or only an agreement for a lease. The passages cited from *Marius* and *Beawes* tend to show that if there be a difference between the figures and the words in the body of a bill, the words are to be taken as conclusive. At the time those authors wrote, acceptances by parol on inland bills of exchange were not uncommon, and parol explanations of such acceptances might often be necessary; but acceptances must now be in writing, under 7 & 8 *Geo.* 4, *c.* 78. In all the cases cited, where the ambiguity has been explained, it was latent, and in such cases extraneous evidence is always admitted. Upon the whole, the defendants contend, 1st, that the bill is either altogether void, by reason of its uncertainty; but, 2nd, if it is valid for any amount, it is for the sum mentioned in the body of the bill, viz., for 200*l.* and not for 245*l.* as stated in the declaration.

Wilde, Serjt. in reply.—The intention of the parties should be taken as the explanation of the meaning of the contract, and that intention is quite clear. It is not disputed but that evidence of a mistake in a mercantile contract is admissible, and this is obviously such a case.

TINDAL, C. J.—The only question is, whether the evidence offered to explain the state of the transactions between the parties to the bill was admissible. It appears to me it was not. This is a distinct case of patent ambiguity; and the rule of law is, that where an ambiguity is patent on the face of an instrument, no extraneous evidence can be received in explanation of it (*k*) In the body of the bill there is no ambiguity; it purports to be drawn for the sum

(*f*) But see *Chambers* v. *Minchin*, 4 Ves. 673.
(*g*) 2 P. Wms. 141.
(*h*) 3 B. & Ad. 728.
(*i*) *Ante* vol. 1, p. 431; 5 N. C. 121; 6 Scott, 866.
(*j*) 6 B. & C. 433; 9 D. & R. 492; 2 C. & P. 559.
(*k*) See Bacon's *Maxims of the Law*; Reg. 23. 2 Star. Ev. 546.

of 200*l.*; but from the figures in the corner it would appear that it was accepted for 245*l.* The ambiguity is, therefore, apparent on the face of the bill. All the cases cited for the plaintiff were cases in which the ambiguity was introduced by matters not appearing on the face of the instrument; as in *Gibson* v. *Minet*, where a bill was made payable to a fictitious payee or order, and the defendants sought to avail themselves of their own fraud, evidence was admitted which enabled the indorsee to recover as on a bill payable to bearer. It is every day's experience, that when difficulties arise from parol evidence, evidence of a like nature is admitted to explain or confirm it, as in the customs and usages of trade, or countries. In *Rex* v. *Elliot*, the margin of the note was looked at merely to ascertain the intention of the prisoner, but by no means for the purpose of ascertaining the nature and meaning of the contract.

I am of opinion that we cannot adopt a safer rule than that laid down by *Marius* and *Beawes*; namely,—in cases of doubt to give the greatest force to the sum contained in the words, in the body of the bill. I think, therefore, this is a good bill for 200*l.*, and that our judgment should be for the plaintiffs for that amount.

BOSANQUET, J.—The substantial question is, whether this is a bill for 200*l.* or 245*l.*; or whether it is void altogether for uncertainty. There was sufficient evidence to show that the parties intended to make a bill for the sum of 245*l.*, but that evidence was not admissible to explain a doubt which arose on the face of the instrument. The rule laid down by *Marius* and *Beawes* seems to me to be applicable to this case, and I think we should be bound by it. I do not know of any case of patent ambiguity in which extraneous evidence has been admitted. Nor do I think the rule of our law, which construes contracts most strongly against the maker of an instrument, is applicable to a case like the present.

COLTMAN, J.—I have no doubt that the evidence contended for by the plaintiffs was not admissible, as such evidence has never been received in cases of patent ambiguity. But I am inclined to think that this is a case in which the rule, *fortius contra proferentem*—that an instrument should be construed most strongly against the maker—should prevail. A party issues a negociable instrument, which is expressed in figures to be for 245*l.*, but which the words import to be for 200*l.* This throws a doubt on the meaning of the instrument, which I think should be construed most strongly against the maker. I apprehend that principle to have been acted on in *Edis* v. *Bury* where a negociable instrument for the payment of money was penned in such equivocal terms as to render it ambiguous whether it were a bill of exchange or a promissory note, it was held that the holder had the option of treating it as either, as *against the maker*; in that case Lord *Tenterden* observed, "I think that where a party thinks proper to issue an instrument in so ambiguous a form, the law ought to allow the owner to treat it either as a promissory note or a bill of exchange at his option;" and Mr. J. *Bayley* and Mr. J. *Holroyd* expressed themselves to a similar effect; the latter said, "Instruments of this nature, as well as others, ought to be construed most strongly against the party making them, especially if there is any supposition of fraud." Now, if it could be shown that fraud was intended in this case, there could be no question that the plaintiff would be entitled to the larger sum; and although there is

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no fraudulent intention, still I cannot help thinking the effect is the same, and that our judgment should be for 245*l.*

ERSKINE, J.—The rule is quite clear that extrinsic evidence cannot be admitted in explanation of a patent ambiguity. In this case the ambiguity undoubtedly arises on the face of the instrument; and the question is, which is to be considered of the greatest importance—the sum expressed in words or that in figures. I am of opinion that the rule laid down by *Marius* is the safest, that the figures are to be considered of less importance than the words in the body of the bill, and therefore, looking at the latter only, our judgments must be for the plaintiffs for 200*l.*

Verdict for the plaintiffs.

May 3

MILLS *v.* FOWKES.

1. The mere existence of cross demands between parties, without a written statement of accounts, is not sufficient to take a case out of the Statute of Limitations, since Lord *Tenterden's* Act (1).

2. Where there is a debt, one portion of which is barred by the Statute of Limitations, and the other is not, and a part payment is made, without its being ascribed to any particular portion of the debt, it will not take the earlier portion out of the statute:

3. But the creditor, in such case, may appropriate the payment to the liquidation of the earlier portion:

4. And *semble*, that he may do so at any time before action brought:

5. At any rate he may do so within a reasonable time.

DEBT.—The *declaration* contained counts for several demands;—*pleas* of set-off, payment, and the Statute of Limitations; and, to one count, payment into Court of 107*l.* 4*s.* 5*d.*; *replication* to the set-off, *nil debet*, as to part of the sum; and the Statute of Limitations to the residue.

The cause having been referred, the arbitrator found; first, with reference to transactions barred in point of time by the Statute of Limitations, that there was a debt due from the defendant to the plaintiff, for rent and other things, which had been reduced by payments to the sum of 156*l.* 19*s.* 7*d.*; that there was a cross debt or set-off due from the plaintiff to the defendant, accruing during the same time, amounting to 51*l.* 10*s.* 6*d.*; secondly, as to the time within six years before the commencement of the suit, that the defendant was indebted to the plaintiff in the sum of 150*l.* 0*s.* 5*d.*; that the defendant was entitled to a set-off of the sum of 7*l.* 16*s.*; and that the payment into Court must be applied, and the arbitrator did apply the same to that part of the amount; that the defendant had also paid the sum of 20*l.* to the plaintiff, which must be applied, and the arbitrator did apply it also to that part of the amount, that is to say, he applied the said sums paid and paid into Court to that part of the plaintiff's demand which had accrued within six years next before the commencement of the suit; that there was not, at any time, any written statement of the account between the parties, signed by them or either of them; and that the defendant did on or about the 22nd April, 1837, pay to the plaintiff the sum of 15*l.*; that before and at the time that the defendant paid the said sum of 15*l.* it was known to both parties that there were unsettled cross demands between them, partly within and partly without the time limited by the statute; that there was no appropriation in

(1) 9 Geo. 4, c. 14.—S. P. *Williams* v. *Griffiths*, 1 Gale, 65; 2 C. M. & R. 45.

fact of the sum of 15*l.*, either by the plaintiff or the defendant; and that there did then exist a debt, not barred by the statute, considerably exceeding in amount the sum of 15*l.*, to which debt the payment might then have been referred.

The arbitrator then awarded and directed, that if the Court should be of opinion, that under the above circumstances, the plaintiff, or the Court, might treat the payment of the said sum as a part payment of the debt that existed more than six years before the commencement of the suit, or if the Court were of opinion that the fact that there were cross demands between the parties, without any written statement of them, signed by the parties or either of them, was sufficient to take the case out of the Statute of Limitations, then that the defendant should pay to the plaintiff the sum of 156*l.* 10*s.* 6*d.*,* if the Court should be of opinion that the defendant was not entitled to the benefit of the set-off accruing to him more than six years before the commencement of the suit; but that the defendant was to pay to the plaintiff the sum of 105*l.* 9*s.* 1*d.* only, if the Court should be of opinion that he was entitled to the benefit of the last mentioned set-off: but if the Court should be of opinion that the whole case was not taken out of the statute under the circumstances, but that the plaintiff was at liberty to appropriate, or in contemplation of law must be taken to have appropriated the said sum of 15*l.* to the debt existing more than six years before the commencement of this suit, then the defendant was to pay to the plaintiff the sum of 15*l.* If the Court should be of opinion that the payment of the said sum of 15*l.* must, under the circumstances, be taken to be a part payment on account of the debt which accrued within six years before the commencement of the suit, then the arbitrator found, that taking into account the sum paid into Court, the plaintiff had been fully paid and satisfied by the defendant, and awarded that the plaintiff was not entitled to recover anything from the defendant.

*Query.— Should not this sum be 156*l.* 19*s.* 7*d*?

Humfrey, for the defendant.—There are three points for consideration:—

First, there being no statement of accounts in writing, between the parties, the mere fact of there being cross demands between them will not, since Lord *Tenterden's* Act (*a*), bring the case within the exception of the Statute of Limitations (*b*). *Williams* v. *Griffiths* (*c*). *Waters* v. *Tomkins* (*d*).

[This point was abandoned by the other side (*e*).]

(*a*) 9 *Geo.* 4, c. 14.
(*b*) 21 *J.* 1, c. 16, s. 3.
(*c*) 1 Gale, 65; 2 C. M. & R. 45.
(*d*) 1 Gale, 323; 2 C. M. & R. 723.
(*e*) The language of the 21 *J.* 1, c. 16, s. 3, is, that "all actions of account, and upon the case, *(other than for such accounts as concern the trade of merchandize between merchant and merchant*, their factor or servants,)" shall be commenced within six years after the cause of action. It has frequently been decided that this exception extends only to *open* or *running* accounts, and not to accounts *stated*, inasmuch as from the *stating* of the account that becomes a *certain debt* which was before an uncertain one. (See *Webber* v. *Tivill*, 2 Saund. 124, and the notes to that case 2 Wms. Saund. 127 *et seq.*) It is also sometimes said by text-writers, that this exception as to merchants' accounts is not confined to persons actually merchants, but that it extends to tradesmen and persons having mutual accounts; and there are one or two authorities which appear to look that way; (See *Cotes* v. *Harris*, Bull. N. P. 149.; *Cranch* v. *Kirkman*, Peake, 121); although a contrary opinion is expressed in some earlier cases; (See *Sherman* v. *Withen*, Chan. Ca. 159; *Farrington* v. *Lee*, 1 Mod. 270). But the case which is principally relied on to support the doctrine in question, (*Catling* v *Skoulding*, 6 T. R. 189), was certainly

Secondly, the payment of 15*l.* by the defendant, without there being any appropriation by either party, will not take the earlier demand of the plaintiff out of the statute. In order to make a payment take a case out of the statute, it must be made on account of a particular debt, and in *part* payment of that debt, and must be specifically applied at the time of payment to that particular debt. *Tippets* v. *Heane* (*f*).

Here there is a debt after the six years to which the payment of the 15*l.* might apply, and it must be inferred, in the absence of proof to the contrary, that it was intended to apply to that debt.

Thirdly, supposing the payment of 15*l.* does not take the case out of the statute, the plaintiff is not entitled to that amount, as the arbitrator has found that that sum was not, in fact, appropriated by either party. The rule of appropriation seems to be the same in law and equity; it is laid down by the Master of the Rolls (*g*), in *Clayton's* case, in *Devaynes* v. *Noble* (*h*), *viz.* that the debtor has the first right to appropriate a payment; and if he does not, the creditor

decided upon a different, and indeed, opposite ground. That was an action for use and occupation, and the defendant pleaded the statute, and set-off a claim for goods sold and delivered. The plaintiff's claim for rent extended for nine years and a-half; but only the last half year's arrear, and only one or two of the last articles supplied by the defendant were within the six years before the commencement of the suit. There had, however, never been any settlement of account between the parties. The plaintiff having had a verdict, a rule *nisi* was obtained for a nonsuit, on two grounds; first, that the case was *not within the exception* in the statute, as not being an account between merchants: and, secondly, that, if it were, it should have been specially replied.

Le Blanc, Serjt. and *Wilson*, in showing cause, admitted that the case did not fall within the exception, but argued, as it had been decided that a promise either express or implied, within six years, would avoid the limitation of the statute, that where there was an open unliquidated account between parties, it was *evidence of such a promise*, and that every new transaction amounted to an implied acknowledgment of the prior existing debt, each article of the account on one side being *equivalent to a part payment of the bill* on the other, *and a promise to pay the balance*. And these arguments were partly adopted by Lord *Kenyon* in giving judgment.

This case, therefore, in no way touched the point as to *merchants' accounts*, but decided a very important principle, *viz.* that a new *item* in a mutual account was *evidence of a mutual acknowledgment* of there being an unsettled account between the parties, and of a *mutual promise* to pay the amount when settled; or, in other words, that it was evidence of a new contract between the parties.

Then came Lord *Tenterden's* Act, (9 *Geo.* 4, c. 14,) by s. 1 of which it is enacted, that "in actions of debt, or upon the case grounded upon simple contract, *no acknowledgment or promise by words only* shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the 21 *J.* 1, c. 16, unless such acknowledgment or promise shall be made or contained in some writing, to be signed by the party chargeable thereby; provided that nothing herein contained shall alter or take away or lessen the effect of any *payment* of any principal or interest."

The case of *Williams* v. *Griffith* accordingly decided that the mere fact of there being cross demands between parties, unaccompanied by a written statement of accounts, or by evidence that the subject of one demand was given and accepted in reduction of the other, is now insufficient to take the case out of the Statute of Limitations. But it appears it is still competent to the parties to show, by *parol* evidence, that it was understood between them that each *item* for which credit was given was to lessen the demand on the other side, as with such an understanding each such *item* would in fact be equivalent to a payment of so much money.

(*f*) 1 C. M. & R. 252; 4 Tyr. 772.
(*g*) Sir *W. Grant.*
(*h*) 1 Merivale, 585; *First exception*, 605.

may do so. These rules as his lordship observes, are taken literally from the civil law. But that law required the appropriation by either party to be made at the time of payment (*i*), and if neither party make any appropriation, then the law appropriated the payment in the way most for the benefit of

(*i*) This is so stated by Sir *W. Grant*; but the limitation of the right of election to the time of payment is in the Digest confined to the case of the creditor, by the express terms, and is only by inference applicable to that of the debtor. The passage cited by his lordship from the Digest ("*in re præsenti; hoc est statim atque solutum est. Cæterum postea non permittitur.*" Dig. L. 46, T. 3, ss. 1, 3,) is immediately preceded by the sentence, "*Permittitur ergo* creditor *constituere, in quod velit solutum:* * * *sed constituere in re præsenti, &c.*"

The rules of the civil law on this subject are thus stated by *Pothier*, (*Traité des Obligations*, P. 3, Ch. 1, Art. 7,) with his usual conciseness and perspicuity.

"*Première règle.* Le débiteur lorsqu'il paie, a le pouvoir de déclarer sur quelle dette il entend imputer la somme qu'il paie. *Quoties quis debitor ex pluribus causis, unum solvit debitum, est in arbitris solventis, dicere quod potius debitum voluerit solutum.* Dig. L. 46, T. 3, s. 1. * *

"*Seconde règle.* Lorsque le débiteur, en payant, ne fait point d'imputation, le créancier à qui il est dû pour différentes causes, peut la faire par la quittance qu'il lui donne. *Quoties non dicimus in id quod solutum sit, in arbitrio est accipientis, cui potius debito acceptum ferat.* Ibid.

"Il faut, 1°, que cette imputation ait été faite dans l'instant: *Dummodo in re præsenti fiat, in re agenda, ut vel creditori liberum sit non accipere, et vel debitori non dare, si alio nomine solutum quis eorum velit; postea non permittitur.* Id. s. 2, 3.

"Il faut, 2°, que l'imputation que fait le créancier soit équitable: *In arbitrio est accipientis, cui potius debito acceptum ferat; Dummodo,* ajoute la loi, *in id constituat solutum, in quod ipse, si deberet, esset soluturus; id est non* (1) *in id debitum quod est in controversia, aut in illud quod pro alio quis fidejusserat, aut cujus dies nondum venerat.* Id. s. 1. * * *

"*Troisième règle.* Lorsque l'imputation n'a été faite ni par le débiteur ni par le créancier, l'imputation doit se faire sur celle des différentes dettes que le débiteur avoit pour lors le plus d'intérêt d'acquitter. * * *

"*Quatrième règle.* Lorsque les dettes etoient d'égale nature, et telles que le débiteur n'avait pas d'intérêt d'acquitter l'une plutôt que l'autre, l'imputation doit se faire sur la plus ancienne: *Si nulla causa prægravet, in antiquiorem.* Id. s. 5. * *

"*Cinquième règle.* Si les différentes dettes étoient de même date, et toutes choses d'ailleurs égales, l'imputation refera proportionellement sur chacune: *Si par et dierum et contracturum causa sit, ex summis omnibus proportione solutum.* Id. s. 8.

"*Sixième règle.* Dans les dettes qui sont de nature à produire des intérêts l'imputation se fait d'abord sur les intérêts avant le capital: *Primo in usuras, id quod solvitur; deinde in sortem, accepto feretur.* L. 1, Cod. *hoc tit.*"

By the modern *French* code it appears that the debtor has the right in the first instance to appropriate the payment; but that this is only a *limited* right, and that in the case of a debt carrying interest, he cannot, *without the consent of the creditor*, appropriate the payment to the principal, in preference to the interest. (Code Civ. Liv. 3, Tit. 3, s. 3, Art. 1253, 4.) On the other hand, it does not appear that the creditor has any absolute right of appropriation; but if the debtor accepts a receipt (*quittance*) from the creditor, whereby the latter has appropriated the payment to a particular debt, the debtor cannot afterwards make a different appropriation, except in the case of fraud or surprise on the part of the creditor. (Id. Art. 1255.) If the receipt bears no appropriation, the payment will be appropriated by law to the debt which it is most to the interest of the debtor to liquidate, among those which are equally due; otherwise upon whatever debt is due, though less burdensome than those that are not so. Among debts of an equal nature the appropriation is to be made on the most ancient; or if all things are equal, then proportionally. (Id. Art. 1256.)

(1) This negative is supplied by *Pothier*; it is not in the usual editions of the Digest.

the debtor, and this latter rule has been adopted by our law; as where there are two debts, one of which would support a commission of bankruptcy, and the other would not, and a payment is made without appropriation, the creditor cannot afterwards appropriate it to the latter debt, but the law will appropriate it to the former as most *onerous* to the debtor; *Meggot* v. *Mills* (*j*); *Dawe* v. *Holdsworth* (*k*). In this case therefore the payment ought to be appropriated to that portion of the debt which has accrued within six years, as being most burdensome to the debtor, the other portion being barred by the statute. If there are two debts and one is illegal, the law will appropriate a payment to the legal debt in the absence of any appropriation by the parties; *Wright* v. *Laing* (*l*); but that is because the *law* will not give effect to a contract which it does not recognize: in such a case, however, the creditor is at liberty to make the appropriation to the demand for which he cannot by law recover, and he may do so *at any time before action brought*; *Philpott* v. *Jones* (*m*). The case of *Peters* v. *Anderson* (*n*), where it was held that the creditor in the absence of any appropriation by the debtor at the time of payment might *afterwards* elect to what debt he would apply the payment, was prior to *Clayton's* case, and was not treated by Sir *William Grant* as of much authority (*o*). The doctrine in *Clayton's* case has been recognized in *Bodenham* v. *Purchas* (*p*), and *Simson* v. *Ingham* (*q*).

Waddington for the plaintiff.—The rule laid down in *Clayton's* case, *Bodenham* v. *Purchas*, and *Simson* v. *Ingham*, is that if there be no appropriation by either party, the law will appropriate it to the earlier debts; and the rule of the civil law, that it is to be applied to the most burdensome debt, is not recognized by our law; the case of *Wright* v. *Laing* indeed establishes the contrary. In *Manning* v. *Western* (*r*), the defendant being indebted on specialty as well as simple contract, made several payments without appropriation, and it was held, that where a payment was general, the application of it was in the party who received the money. *Hawkshaw* v. *Rawlings* (*s*), *Goddard* v. *Cox* (*t*), *Kirby* v. *Duke of Marlborough* (*u*), *Bosanquet* v. *Wray* (*v*), and *Philpott* v. *Jones*, are to the same effect, and are therefore authorities for the plaintiff. The plaintiff therefore might have appropriated the payment to the earlier debt at any time.

TINDAL, C. J.—There are two points left to be decided in this case;—

First, whether the payment of 15*l.* in April, 1837, was such a part payment as will take the earlier portion of the debt out of the operation of the Statute of Limitations; and,

Secondly, supposing that not to be so, whether the plaintiff still had a right to appropriate that sum in discharge of that earlier portion of the debt.

As to the first point, I think this was not such a payment as will take the

(*j*) 1 Ld. Raymond, 286.
(*k*) Peake, 64.
(*l*) 3 B. & C. 165; 4 D. & R. 783.
(*m*) 2 A. & E. 41; 4 N. & M. 14.
(*n*) 5 Taunt. 596; 1 Marsh. 238.
(*o*) See 1 Meriv. 606.
(*p*) 2 B. & A. 39.
(*q*) 2 B. & C. 65; 3 D. & R. 249.
(*r*) 2 Vernon, 606.
(*s*) 1 Stra. 24.
(*t*) 2 Stra. 1194. See also *Bloss* v. *Cutting*, cited *ibid.*
(*u*) 2 M. & S. 18.
(*v*) 6 Taunt. 597. 2 Marsh. 319.

case out of the statute. The law is correctly stated in *Tippets* v. *Heane*, that there must be evidence to show that the payment was made in part discharge of a particular debt. Now there is no sufficient evidence of that in the present case, although, in point of fact, the debt contracted before the commencement of six years, and the debt contracted afterwards, are all but one debt; yet, looking to the terms of Lord *Tenterden's* Act, (9 *Geo.* 4, c. 14,) which says "that nothing therein contained shall alter or lessen or take away the effect of any payment of principal or interest," it is evident there is a distinction intended between that part of an account which accrues before, and that which accrues after the six years, particularly as the statute relates to the barring of the debt. The payment therefore on which a party intends to rely ought to be made distinctly, in respect of the former portion of the debt; but there is no evidence here that the payment was made on account of the former portion.

The second question stands upon a wholly different footing,—it is, whether the plaintiff had the right to appropriate the payment in satisfaction of the earlier portion of the debt; and I am of opinion that under the circumstances he had such a right; for though he may be barred by the Statute of Limitations from suing the defendant for such portion, yet the law still remains open as before, as to his power of appropriating a payment made to any portion of the debt, in the absence of any appropriation by the defendant. It is said indeed, on the part of the defendant, that when a payment is thus made generally it should be applied to the more burdensome debt; and this is said to be the rule of the civil law; but I do not think it is the rule of our law.

The general rule is *quicquid solvitur, solvitur in modum solventis*, that is that the party paying may make the payment upon what amount he thinks fit; but if no appropriation is made by the party paying, at the time of payment, then *recipitur in modum recipientis* (*w*). If neither party makes any appropriation, the law applies the payment to the earliest debt. This lets in the consideration of the cases where the creditor has applied a payment as he thought fit. The defendant says that the creditor is bound to make the appropriation immediately, or else the law will apply the payment to the most burdensome debts; but it appears to me the cases are the contrary way. In *Goddard* v. *Cox*, it appeared that one *Owen* had been indebted to the plaintiff for coals; after his death his widow, who was his executrix, continued to deal with the plaintiff, and received coals on her own account, and then married the defendant, who also received coals on his own account. The defendant made several payments generally on account, and *Lee*, C. J., held that the right of appropriating the payments thereby devolved to the plaintiff, and that he might apply the money received to discharge the wife's own debts; though as to the demand against her as executrix, the validity of which depended on the question of assets and manner of administering them, he was of opinion that the plaintiff could not apply any of the money paid by the defendant to the discharge of that demand. This case therefore showed that the law is not so broad as contended for by the learned counsel for the defendant.

In *Philpott* v. *Jones*, it was held that the vendor of spirits in small quantities,

(*w*) See 2 Vern. 607.

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for the price of which he was disabled from recovering by 24 *Geo.* 2, c. 20, s. 12, who had another demand against the vendee, might apply a payment made to him by his debtor to the price of the spirits, where there had been no appropriation by the debtor at the time of payment, and that the creditor might so apply the payment at any time afterwards. In this case it will be observed that the items to which the payment was appropriated by the creditor could hardly in strictness be called *a debt*, and nevertheless it was held that the creditor had a right to apply the payment to a discharge of that part of his claim.

In *Peters* v. *Anderson*, the case was this:—the plaintiff served the defendant three years, under a covenant; and three years and a quarter more under a simple contract. He received goods and money during the first period, in part payment; he also received goods and money during the second period: the whole receipts more than covered the salary due under the covenant; the parties kept a blended account, and made no rest in it at the end of the first period. The plaintiff brought covenant for the balance of wages during the first period, and assumpsit for the balance of wages for the last. The defendant attempted to appropriate by set-off to the discharge of the covenant debt as much of the money and goods as would cover it; but it was held, first, that there were two separate debts, and not one account; and, secondly that the plaintiff had the election to ascribe to the second debt, for which he had the worse security, the value received in the second period, and might therefore recover in both actions. In that case therefore if the money might have been applied as the defendant thought fit, his set-off would have been an answer to the action of covenant; but the plaintiff bringing that action elected to appropriate the payments to the latter debt.

In *Bosanquet* v. *Wray*, it was held that a creditor receiving money without any specific appropriation made by the debtor, may be permitted in a court of law to ascribe his receipt to the discharge of a prior and purely equitable debt, and to sue him at law for a subsequent legal debt.

In *Simson* v. *Ingham*, the same principle is recognized: *Best*, J., indeed lays down the rule in that case, that the appropriation by the creditor must be made within a reasonable time (*x*), but without pausing to enquire whether that rule is well founded, it is sufficient to observe that I am not prepared to say but that the appropriation here has been made in a reasonable time. In this case, however, there are not two distinct debts, one of which is more burdensome than the other; it is all one debt, part of which is barred and the remainder not. The plaintiff could not know that the defendant would set up the Statute of Limitations as a defence, which he ought not to do if he knew the debt was in fact due.

I think therefore that, under the circumstances, the 15*l.* should be applied to discharge the earlier portion of the account, and consequently that the plaintiff is entitled to judgment on that account.

BOSANQUET, J.—This is an action to recover a debt which consists of two parts, one which accrued six years before the action was commenced, the

(*x*) According to the report in 2 B. & C.; but there is no such observation reported in 3 D. & R.

other within that period. The first point is whether this, being an open account, was within the exception in the Statute of Limitations since Lord *Tenterden's* Act; but it has been admitted that the case of *Williams* v. *Griffith*, cited on the part of the defendant, is applicable and decisive of this point. The second point is, whether the payment of 15*l.* in April, 1837, is sufficient to take the case out of the statute, since Lord *Tenterden's* Act; but I am of opinion, that in order to have that effect, there must be some evidence to show that the payment was made on account of the particular debt which would otherwise be barred by the statute. Now it is clear in this case that the 15*l.* was paid on account of some part of the whole debt, but there is no evidence that it was paid in respect of the former part, to which the statute has been pleaded. A payment to take a debt out of the operation of the statute, must be, by the act of the debtor, applied to that particular debt; but there is no ground for saying that the payment in this case was by any act of the debtor applied to the earlier portion of the debt. Then comes the third question, whether the creditor had not a right to appropriate the sum of 15*l.* to the earlier portion of the debt; such payment not having been appropriated by the debtor at the time of payment, when he might have done so. It is clear that the right to appropriate then accrued to the creditor, but in point of fact, there was no actual appropriation made, at the time, by either party. The question then is, whether it must not be taken that the plaintiff has appropriated the payment to the older debt. He could recover part of the debt, and part he could not; but the whole was nevertheless a legal subsisting debt. It was clearly his interest to appropriate the payment to the former part of the debt, and I am of opinion that his right to do so continued up to the time of bringing his action. Looking therefore to all the cases, there seems to be none where it has been held to be indispensably necessary that where a debtor has not appropriated a payment, the creditor should do any specific or open act to show appropriation on his part before action brought.

COLTMAN, J.—There have been only two questions seriously contested in this case, first, whether the payment of 15*l.* was sufficient to take the case out of the statute. It was argued that a party must be taken to be cognizant of the state of the balance, and certainly it might be reasonable to suppose that the debtor meant honestly to make the payment on account of the former debt; but there is nothing here to show such knowledge on the part of the defendant, and, unless we begin from that foundation, there is no reason to say that the payment was made by the defendant on account of the old debt. The second point is whether the plaintiff has a right himself to appropriate such payment to the former part of the debt, *Meggot* v. *Mills* and *Dawe* v. *Holdsworth* were cited as authorities for the defendant to show that it should be applied to the most burdensome debt; it does not however appear to me that our law recognizes that rule; nor is our law inconvenient in this respect, because if the debtor does not apply a payment himself, it is as much as saying that the creditor may do so. I consider the English law settled on this point, that a creditor may appropriate a payment, if the debtor does not. Whether the creditor is bound to do so within a reasonable time, it is not necessary to discuss here, as the time in this case, within which the appro-

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priation was made, was certainly reasonable. *Best*, J. appears to be the only judge who mentions that rule (*y*).

ERSKINE, J. I entirely concur on both points. As to the first, the principle is clearly laid down in *Tippets* v. *Heane*, that in order to take a debt out of the statute on the ground of there having been a part payment, it must be shown that it was the intention of the debtor that the payment should be on account of that particular debt, the principle being that such a payment is an acknowledgment of a subsisting debt. Here there is one debt consisting of two parts, one of which was barred, the other not. If we were asked what was the probable intention of the party paying we must perhaps say it was to pay on account of that debt, which he might be compelled by law to pay. *Meggot* v. *Mills* and *Dawe* v. *Holdsworth* were decided on this ground; but there is no evidence here that the debtor *did* appropriate the payment to the recent portion of the debt; and then the creditor might appropriate it to whichever portion he pleased, and I think the circumstances show that he has appropriated it to the older portion.

Judgment for the plaintiff for 15*l*. (*z*).

(*y*) See last note.

(*z*) See *Abbott* v. *Bruere*, *post*, 5 N. C. 598; 7 Scott, 753; *Williams* v. *Griffith*, 5 M. & W. 300.

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May 7.

An instrument, by which *A.* agrees to assign a term to *B. on payment of* 200*l.*, and *B.* agrees to indemnify *A.* from the covenants in the original lease, and which contains a stipulation that *A.* should re-enter on non-payment, is only an agreement for an assignment.

In an action against an assignee of a term for rent, a witness who was proved by previous evidence to have been in possession of the premises, and to have paid rent, was called by the plaintiff:—*Held*, that any objection to his competency ought to be taken on the *voir dire*; and that, it being shown, he was not assignee, he was a competent witness for the plaintiff.

COVENANT for non-payment of rent against the assignee of a lease dated in 1812, for twenty-six years, the assignment having taken place in 1826. The *second* plea traversed the assignment; the *third* alleged that the sum claimed as rent did not become due whilst the defendant was possessed of the demised premises *modo et formâ*, &c. (*a*).

At the trial, before *Tindal*, C. J., at the *London* sittings after last *Easter* Term, the assignment to the defendant was duly proved. It was also proved that rent had been received from one *Walcot*, who occupied the premises; and *Walcot* himself was then called as a witness, who stated that he occupied the premises under the defendant from *May*, 1827, until *June*, 1829, and paid rent to the plaintiff. He produced a written agreement between the defendant and himself, whereby it was agreed that, in consideration and *on payment of* 200*l.* and interest, at the times and in the manner mentioned in a warrant of attorney bearing even date therewith, the defendant *should assign* to *Walcot* the residue of the term in the premises at the yearly rent of 100*l.*, and under and subject to the covenants, provisoes and agreements contained in the original lease; and *Walcot* agreed to accept the said lease on payment of the 200*l.* and interest; and in the mean time, and *until such assignment was made*,

(*a*) See other pleadings in this case on demurrer in Hil. T. 1838, *ante* vol. 1, p. 15; S. C. 4 New Ca. 178; 5 Sc. 506; 6 D. P. C. 404.

well and truly to pay the rent and perform the covenants, conditions and agreements contained in the original lease, and of and from the same to save harmless and keep indemnified the defendant; and it was further agreed, that, "in case default should be made in payment of all or any or either of the instalments mentioned in the said warrant of attorney, the defendant should be at liberty to re-enter and enjoy the said premises as in her former estate." It was also proved that *Walcot* had never paid the 200*l.*, and that no formal assignment was ever made.

It was objected on the part of the defendant that *Walcot* was an incompetent witness, as being *the assignee* of the premises; the instrument being a complete assignment from the defendant, and establishing the third plea.

It was contended for the plaintiff that the instrument was not an assignment, and that the objection to *Walcot's* competency should have been taken on the *voir dire*.

A verdict was taken for the plaintiff, with leave to move to enter a nonsuit on these two points.

Bompas, Serjt. having obtained a rule *nisi* accordingly,

Peacock showed cause. He repeated the argument that the instrument in question was not an assignment, but only an agreement for an assignment, as the assignment was contingent upon *Walcot's* paying the 200*l*; that he was therefore a competent witness; or at any rate that the objection to his competency came too late.—1 Phillips on Evidence (*b*).

Bompas, Serjt., and *Hoggins*, in support of the rule.—The possession of the premises by *Walcot* was *primâ facie* evidence of the assignment; and if the assignment had taken place, he was an incompetent witness, for his evidence would discharge himself of liability, and fix it on the defendant. The statute 3 & 4 *W.* 4, *c.* 42, *ss.* 26, 27 (*c*), does not make him competent, for that has only reference to cases where a verdict would be evidence for or against a witness, but here *Walcot* had a direct interest in the cause, and therefore was not a competent witness. *M'Brain* v. *Fortune* (*d*), *Ripley* v. *Thompson* (*e*), *Bland* v. *Ansley* (*f*). It was held in *Burgess* v. *Cuttill* (*g*), that the statute does not make the drawer of an accommodation bill a competent witness for the defendant in an action by the indorsee against the acceptor. [*Bosanquet*, J.—The authority of that case has been a good deal

(*b*) p. 133, last ed.—p. 123, 6th ed. See also 1 Stark. Ev. 122, 2nd ed.; Rosc. Ev. by Crompton & Smike, 107.

(*c*) Sect. 26 enacts, that "if any witness shall be objected to as incompetent on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witnesses shall nevertheless be examined, but in that case a verdict or judgment in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him or any one claiming under him." By sect. 27 it is directed that the name of such witness shall be indorsed on the record.

(*d*) 3 Campb. 317.

(*e*) 12 Moo. 55.

(*f*) 2 N. R. 331.

(*g*) 6 C. & P. 282; 1 Moo. & Rob. 315.

doubted (*h*).] In *Yeomans* v. *Legh* (*i*), *Parke*, B., said, the 20th section of the act applied to cases where the *only* interest was, that the verdict in the action would be evidence for or against the witness. In the present case, the witness has obviously a further interest, viz. to discharge himself from his liability as assignee. Then, if the witness was wholly incompetent on the ground of interest, there was no necessity to examine him on the *voir dire* (*k*).

But at any rate the instrument proved by *Walcot* was an actual assignment of the term, and not a mere agreement to assign. It operated as a transfer of all the defendant's interest to him, *Walcot*, with a condition for re-entry, which may be imposed, though the assignor has no reversionary interest, *Palmer* v. *Edwards* (*l*), *Doe* d. *Freeman* v. *Bateman* (*m*). It was clearly the intention of the parties that an immediate change of possession should take place, and that the defendant should be divested of all right of possession; and this, therefore, will operate as a perfect assignment. Bac. Abr. tit. *Lease*, (K.): *Curtis* v. *Spitty* (*n*), *Poole* v. *Bentley* (*o*), *Pinero* v. *Judson* (*p*), *Warman* v. *Faithful* (*q*), *Chapman* v. *Bluck* (*r*), *Pluck* v. *Digges* (*s*).

TINDAL, C. J.—The principal question in this case is, whether the instrument produced at the trial was an actual assignment or not; and it appears to me that it was merely an agreement to assign, according to the intention of the parties, by which we must construe it.

It clearly appears that it was not intended by the defendant to give an assignment of the term from the time of *Walcot's* entering into possession, but merely that the assignment should be executed and take effect on the payment of the sum stipulated for. The express words of the instrument are, that the defendant, "in consideration and on payment of 200*l.* and interest, at the time and in the manner mentioned in a warrant of attorney," &c., agrees to assign to *Walcot* the lease of the premises; and *Walcot*, on the other hand, agrees to accept the said lease *on payment of* 200*l.* and interest. It is not worded as an instrument which was to receive its effect in consideration of a sum stipulated *to be paid*, but in consideration of the *payment of* that sum; and that never has been paid. *Walcot* also stipulates to pay rent and indemnify the defendant from the covenants in the original lease, which would not have been necessary if the defendant had assigned the lease to him. I think, therefore, both from the express words of the instrument and the evident intention of

(*h*) *Burgess* v. *Cuttill* was tried before Lord *Lyndhurst* in 1833, the same year that the statute 3 & 4 Will. 4 was passed. In *Faith* v. *M'Intyre* (7 C. & P. 44), tried before *Parke*, B., in 1835, exactly the same point arose, but his lordship held, that by indorsing the drawer's name on the *postea* (under the 27th section), he was rendered a competent witness. In that case, *Burgess* v. *Cuttill* was referred to by *Platt* for the plaintiff, but not cited by name. The *nisi prius* cases upon the construction of this act have been any thing but uniform. See *Pickles* v. *Hollings*, 1 Moo. & Rob. 468; *Creevey* v. *Bowman*, Id. 496; *Mitchell* v. *Hunt*, 6 C. & P. 351; *Harrington* v. *Caswall*, Id. 352; *Harding* v. *Cobley*, Id. 664; *Hodson* v. *Marshall*, 7 C. & P. 16.

(*i*) Mur. & Hurlst. 87; 2 M. & W. 419.

(*k*) *Vide* note (*b*) *ante*.

(*l*) Doug. 187, n.

(*m*) 2 B. & A. 168.

(*n*) 1 Scott, 737.

(*o*) 12 East, 168.

(*p*) 6 Bing. 206; 3 Mo. & P. 497.

(*q*) 5 B. & Ad. 1042; 3 N. & M. 137.

(*r*) *Ante*, vol. 1 p. 27; 4 N. C. 187; 5 Scott, 515.

(*s*) 5 Bligh, N. S. 31

the parties, that it is a mere agreement to assign, and not an actual assignment.

The second question is, whether the exception to *Walcot* as an interested witness ought to have been taken on the *voir dire*. A witness is previously called who states that he received rent for the plaintiff from *Walcot*, and that he then occupied the premises; and then *Walcot* himself is called. (His lordship here recapitulated the evidence.) There is nothing in all this to fix him as assignee. The very point, however, is determined in *Bunter* v. *Warre* (*q*). There, in an action of replevin for growing crops, the defendant avowed for rent due from the plaintiff and *Thomas Bunter*. The plaintiff denied the tenancy, and it was held, that *Thomas Bunter*, though in possession of the premises, might be examined as a witness to disprove the joint tenancy, he not being liable to costs; and that he might at least have been examined on the *voir dire* as to his interest in the event of the suit.

The witness here is in precisely such a position as would warrant his being examined on the *voir dire*.

I am of opinion, therefore, that the rule must be discharged.

BOSANQUET, J.—This case turns really on the effect of the instrument produced at the trial: but two questions have been raised; the first, whether the instrument was legally produced; the second, as to its effect when produced. As to the first point, it is said that the party who produced the agreement and proved other matters, was an interested witness. By the examination of a previous witness, it was shown that this party, (*Walcot*) was in possession of the premises, and paid rent for them. This throws just such a doubt on the question of his interest as would render it necessary for him to be examined on the *voir dire*. When a witness is objected to on the ground of interest, the ordinary mode is so to examine him. The cases at *nisi prius* upon this subject are certainly not consistent; but at any rate the weight of them is not against such a method of examination. In *Goodhay* v. *Hendry* (*r*), a bankrupt was called as a witness for the plaintiff, his assignee; he stated that he had his certificate, but did not produce it; his release to his assignees was in court; and *Best*, J., held, that both release and certificate were necessary to remove the incompetency of the witness; his lordship said, "It is not like the case of an objection raised by secondary evidence on the *voir dire*, which may be removed by it; here the witness stands disqualified, and his competency must be set up by the best evidence." And in an *Anonymous* case (*s*) before my lord chief justice, his lordship seems to have entertained a similar opinion. On the other hand, in *Wandless* v. *Cawthorne* (*t*), tried before *Park*, J., the same point was made, and his lordship said he should certainly overrule the objection. The certificate was, however, ultimately produced. In *Carlisle* v. *Eady* (*u*), which was also an action by the assignees of a bankrupt, tried before the same learned judge, the bankrupt stated on the *voir dire* that he had obtained his certificate, and released his assignees; and his lordship ruled that this was quite sufficient, without the production of either certificate or release, to render him a competent witness. (*x*)

(*q*) 1 B. & C. 689; 3 D. & R. 106.
(*r*) Moo. & M. 319.
(*s*) Id. p. 321 (n.)
(*t*) Ibid.
(*u*) 1 C. & P. 234.
(*x*) So in *Ingram* v. *Dade* (Id. p.)

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The previous evidence in the present case was equivocal, and the circumstances under which the rent had been paid by the witness ought to have been inquired into.

That which is stated by a party on the *voir dire* is not evidence in the cause, but is matter of consideration for the judge who may examine the witness as to his interest. I think, however, that *Bunter* v. *Warre* is decisive upon the present question. *Bailey*, J., there says, "It is the constant practice in such cases to examine the witness on the *voir dire* as to the facts upon which his competency depends, and it is a proper and necessary course to pursue."

On the next question, as to the effect of the instrument, we are bound to look to the intent of the parties as manifested on the face of that instrument; and if it appears that the intent was to give the whole interest in the term immediately to *Walcot*, it would undoubtedly operate as an assignment; but I think no such intent is manifest here: there was in fact to be no assignment till the money was paid by *Walcot*; and it is not necessary to consider what interest he took in the mean time.

COLTMAN, J.—With regard to the first question there appears to have been a considerable fluctuation of opinion. There has been no precise decision on the point; but I am disposed to agree with the opinion of Mr. Justice *Bayley* in *Bunter* v. *Warre*. There would be no justice in allowing the party objecting to a witness to examine him on the *voir dire*, and not allowing the same right to the party producing him. It is a recognised mode of inquiring in a summary way into a collateral matter not in issue in the cause, as to which either party may examine a witness; and it is not because a party objecting to a witness declines to examine him on the *voir dire*, that the party producing him may not do so.

As to the operation of the deed, I own it appears to me that some parts of it look one way, and some another. The stipulation for the right of re-entry reserved to the defendant looks as it were meant to operate as a present assignment; but the clause as to the repayment presents another aspect. I think, however, upon the whole, we must consider it merely as an agreement to assign.

ERSKINE, J., concurred on both points.

Rule discharged.

235 n.) which was an action by an administrator, the next of kin being called, was allowed by Lord *Ellenborough* to state on the *voir dire* that he had released the plaintiff. But in *Quarterman* v. *Cox* (8 C. & P. 97) it was ruled by *Coleridge*, J., that if an interested witness state on the *voir dire* that he is released, and that his *release is in Court*, the opposite counsel has a right to see it; and if it is on a wrong stamp, it will be invalid; but that *if the release had not been in Court*, the declaration of the witness that he was released would have been sufficient. See also *Godmanchester* v. *Phillips*, 6 N. & M. 211.

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In an action against magistrates, where there has been a verdict for the defendants, the judge who tried must certify to entitle them to double costs, under 7 *Jac.* 1, c. 5.

TRESPASS against two magistrates of the borough of *Poole*, for issuing a distress warrant for a poor's-rate, under which plaintiff's goods were sold. A verdict was found for the defendants at the *Dorset* Spring Assizes, 1838. A rule *nisi* for a new trial had been discharged in *Hilary* Term last (*a*).

Lord *Denman*, C. J., before whom the case had been tried, had not certified that the action was brought against the defendants, as magistrates, although his Lordship had been repeatedly applied to for that purpose, and as the fact did not appear on the record, the Master had refused to allow double costs, although the plaintiff admitted the fact before him.

Bompas, Serjt., upon an affidavit of these facts, had obtained a rule calling on the plaintiff to show cause why a suggestion should not be entered on the record, that the defendants were sued as magistrates, or why the master should not allow them their double costs. He referred to 7 *Jac.* 1, c. 5, s. 1 (*b*), and 21 *Jac.* 1, c. 12 (*c*).

(*a*) *Ante* Vol. 1, p. 539; 5 New Ca. 319; 7 Sc. 285; 7 D. P. C. 440.

(*b*) Which, after reciting as follows, "For ease in pleading against many causeless and contentious suits which have been, and daily are, commenced and prosecuted against justices of peace, &c. &c., who, for due execution of their office, have been troubled and molested by evil-disposed contentious persons, to their great charge and discouragement in doing of their offices," enacts, that, "if any action upon the case, of trespass, or false imprisonment shall be brought against any justice of peace, &c., for any thing done by virtue of their office, it shall be lawful for every such justice, &c., and all others which in their aid, or by their commandment, shall do anything touching his office, to plead the general issue, and to give such special matter in evidence, which, being pleaded, had been a good and sufficient matter in law to have discharged the defendant of the matter laid to his charge. And if the *verdict* shall pass with the defendant, or the plaintiff become *nonsuit*, or suffer any *discontinuance*, the justice or justices, or such other judge *before whom the said matter shall be tried*, *shall*, by force and virtue of this Act, *allow* unto the defendant his double costs, for which the defendant shall have like remedy, as in other cases where costs are given to defendants."

(*c*) Secs. 1 & 2 recite and make perpetual the 7 J. 1, c. 5. Sec. 4 recites that, "notwithstanding the said statute, the plaintiff is at liberty to lay his action against any justice of peace, &c., in any foreign county at his choice, which hath proved very inconvenient unto sundry officers and persons aforesaid that have been impleaded by some contentious and troublesome persons in counties far remote from their places of habitation;" and sec. 5 enacts, that if any action upon the case, trespass, &c., shall be brought against any justice of peace, &c., for any thing done by virtue of their office, the said action shall be laid within the county where the trespass or fact shall be done or committed, and not elsewhere, &c.; and if upon the trial the plaintiff shall not prove that the trespass or cause of action was committed or done within the county where such action shall be laid, the jury shall find the defendant not guilty, without having any regard to any evidence given by the plaintiff; and the verdict shall pass with the defendant in any *such* action, or the plaintiff therein become non-suit, or suffer any discontinuance, the defendant *shall have* such double costs, and all other advantages and remedies as in and by the said former act is limited, directed or provided."

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Crowder, Q. C., and *Bingham* now showed cause. The certificate is entirely within the discretion of the judge at *nisi prius*, and it is indispensable to the obtaining of double costs that he should certify. In the absence of such certificate the Court has no jurisdiction. The practice has been so settled for a long period of time, *Anon.* (*d*), *Grindly* v. *Holloway* (*e*), *Harper* v. *Carr* (*f*). The 21 *Jac.* 1, c. 12, secs. 1 & 2, makes perpetual the former Act, and the 5th sec. only applies to actions not brought within the proper county. The judge at *nisi prius* is the proper person to exercise the discretion as to granting double costs, being the best acquainted with the facts of the case. A case might easily arise where, by the strict letter of the statute, the defendant was entitled to a verdict or non-suit, and yet ought not to have double costs, as in *Bolton* v. *Boldero*, cited by *Burrough*, J., in *Wright* v. *Wales* (*g*), where the defendant, a justice of the peace, having called his coachman or groom into the parlour, ordered him to saddle a horse for his daughter, and on the servant's saying he would be damned if he did, the justice directed a warrant against him, under which he was committed; and the groom brought an action against his master for false imprisonment, but having laid the venue in the county where the prison was situate, he was non-suited; it being held by Lord *Mansfield*, that the defendant, having supposed that he had a right to commit, was entitled to be sued as a magistrate, and consequently that the action should have been brought in the county where the alleged act was committed (*h*), although he had acted without jurisdiction. But that surely was not a case in which the defendant would have had his double costs.

Wilde and *Bompas*, Serjts., in support of the rule.—The present application to the Court is for the purpose of effectuating the intention contained in the statute. There is no mention of the word *certificate* in the Act, and a suggestion on the record will answer all the purposes of the statute quite as well. No discretion is given by the statute. The terms are imperative. The judge is called on to *allow* the double costs, not to certify; the statute, therefore, invests a defendant, under the circumstances contemplated, with certain rights, and he is entitled to call upon the Court to put him in possession of those rights. The words of the act are—"The justice or justices, or such other judge before whom the said matter shall be tried, shall, by *force and virtue of this act, allow* unto the defendant his double costs." The judge's duty is merely ministerial. The act speaks of three different events—a verdict, a non-suit, and a discontinuance, and in either case the justice, or justices, or judge before whom the matter is tried, are to allow these costs. It is clear that the third event, the "discontinuance," cannot refer to a trial at *nisi prius*. A "non-suit" also might take place by reason of the plaintiff's not appearing, in which case the judge at *nisi prius* would know no more of the case than the judges *in banc*. The mention of "justices" in the plural number would seem to lead to the inference that it was intended to give the full court a jurisdiction over the costs. The cases which have been cited were determined with reference to the 7 *Jac.* 1. The later statute of 21 *Jac.* 1 is not referred to in them, and the attention of the Court is now drawn to it for the first time. The object of that statute is not merely to make the for-

(*d*) 2 Vent. 45.
(*e*) Doug. 397.
(*f*) 7 T. R. 448.
(*g*) 5 Bing. 336, 339; 2 M. & P. 613, 623.
(*h*) Under the 21 J. 1, c. 12, s. 5.

mer perpetual; but the language in the 5th sec. is materially different, for it expressly says that, in the cases provided for, the defendant *shall have* his double costs.

TINDAL, C.J.—It appears to me that this rule must be decided on the proper construction of the statute of 7 *Jac.* 1, c. 5; for as to the later statute of 21 *Jac.* 1, I do not think it applies to such a case as the present, but to new and different cases then introduced. (His Lordship, after reading the sections of the two acts, proceeded to observe)—The preamble of the second act shews clearly that the object of the legislature was to give a remedy for bringing actions in remote counties, and it goes on to give the magistrates certain advantages: it contains distinct provisions from those of the former act, but expressly says, that in the cases so newly provided for, the defendant "shall have *such* double costs, and all other advantages and remedies, as in and by the said former act is limited, directed or provided." This carries us back, therefore, at once to the construction of the former act, and I may observe, it would have been needless, in the first and second sections of the second act, to have repeated the provisions of the former act if it were not intended that the two statutes should have a distinct operation. Now the former act provides that, "in case a verdict pass with the defendant, or the plaintiff become non-suit, or suffer any discontinuance, the justice or justices, or such other judge before whom the said matter shall be tried, shall allow the defendant his double costs."

One observation in support of the rule was, that the three different events—a verdict, non-suit, and discontinuance—cannot all be the subject-matter of a trial at *nisi prius*, and therefore the words "justice or justices, or such other judge before whom the matter is tried," must apply, as well to the court, as to the judge at *nisi prius*; and it was argued that the costs may be allowed by a suggestion entered on the record, as well as by certificate. The words of the first statute are certainly involved in some degree of obscurity, but they must be taken according to the subject-matter. I should say, the words "justice or justices, or other judge," comprehended all courts of record; "justice or justices" applying to the judge at *nisi prius*, and "other judge" to a judge of an inferior court. It appears to me to be the obvious meaning of the act, that the judge who allows the costs should have some acquaintance with the subject-matter of the suit, and hence the most proper party to allow the costs is the judge at *nisi prius* before whom the cause has been tried. There may be cases where a suggestion on the record might be the proper course, as in those suggested, of a discontinuance, or a non-suit by reason of the non-appearance of the plaintiff, where the judge at *nisi prius* would be ignorant of the merits of the cause; but it is sufficient to say that such is not the present case. It is said that the word "allow," is inapplicable to carry into effect the intention of the statute, as contended for on the part of the plaintiff. Properly speaking, the judge does not "allow" costs; the word is strictly applicable to the Master's *allocatur*; but the judge will, if he thinks fit, in some manner, signify his allowance of double costs to the court above.

If there had been no authority there might, possibly, have been some doubt; but after the long series of decisions upon the subject I think the rule must be discharged.

BOSANQUET, J.—I should have thought, after four decisions—one in *Ventris*,

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one by Lord *Mansfield*, another by Lord *Kenyon*, and a fourth in the Exchequer, *Norman* v. *Danger* (*i*)—this question might have been considered at rest, and that it would not have been necessary to enter anew into the interpretation of these statutes. Without shrinking, however, from the inquiry, I shall content myself with saying, that I fully concur with my Lord Chief Justice. The fact of Lord *Denman's* not having yet granted a certificate gives the Court no jurisdiction, nor would it, even if his lordship had refused to do so; but it is clear that the time for granting a certificate has not yet expired.

COLTMAN, J.—I am of the same opinion, and I form my judgment on the simple ground that authorities should not be departed from, unless they are obviously unjust.

ERSKINE, J.—It appears to me that the statute of 21 *J.* 1, applies only to the cases therein mentioned, for the same benefit had been previously conferred upon justices of the peace, by the previous statute, in other cases. Perhaps if this case had arisen now for the first time we might have had to determine how best to bring the fact of the defendant being a magistrate before the Court, as in *Rex* v. *Poland* (*k*), where the Court gave leave to a defendant to enter a suggestion on the record, in order to entitle him to treble costs, under the statute 10 & 11 *W.* 3, c. 11. In the present case, however, where there has been a verdict, I think the certificate of the judge who tried the cause is the proper, as well as the usual course, and I see no reason to change the practice.

Rule discharged.

(*i*) 3 Y. & Jer. 203. It was there held that the certificate need not be granted immediately after the trial of the cause, but that the judge before whom the cause was tried might, *even after an interval of four years*, upon an affidavit that the defendant was within the provisions of the 7 *J.* 1, c. 5, grant a certificate to entitle him to double costs.

(*k*) 1 Stra. 49.

KAY *v.* MARSHALL and others.

May 8.

The plaintiff took out a patent for "new and improved machinery for preparing and spinning flax by power," and by his specification the invention was declared to consist of new machinery for macerating flax previous to drawing and spinning it, and also of improved machinery for spinning the same after having been so prepared. This latter improvement was declared to consist in placing the drawing rollers only two and a-half inches from the retaining rollers. The maceration of flax, as a preparation for spinning, was found to be a new invention; but before the patent, it was a fundamental principle of dry spinning that the length of the reach could be varied according to the length of the fibre of the article to be spun, by placing the drawing rollers at different distances from the retaining rollers:—*Held*, therefore, that as the patent was taken out for an invention, consisting of two distinct parts, one of which was not new, the whole was void.

THE following case was sent by the Master of the Rolls for the opinion of this Court:—

The plaintiff obtained letters patent, dated 26th July, 1824, for "new and improved machinery, for preparing and spinning flax, hemp, and other fibrous substances, by power."

In the language of the specification, (which which dated 26th January, 1826, and duly enrolled in Chancery), the invention was declared to consist of "*new machinery for macerating flax*, and other similar fibrous substances, previous to drawing and spinning it, which is called the preparing it; and also of *improved machinery for spinning the same*, after having been so prepared;" and the patentee, in describing the improved machinery for spinning, said "that he placed the drawing rollers only two inches and a-half from the retaining rollers, and that this constituted the principal improvement in the said spinning machinery." Then he proceeded to assign the reason and principle upon which the alleged improvement rested; and in a later part of his specification (when stating the extent of what he claimed as his own invention in respect of improved machinery for spinning flax), he described it to be "the wooden or other trough for holding the rovings when taken from the macerating vessels, and the placing of the retaining rollers, and the drawing rollers nearer to each other than they had ever before been placed, say within two inches and a-half of each other, for the purpose aforesaid."

On the 2d June, 1836, a trial was directed by the Master of the Rolls upon two issues; first, whether the plaintiff had before, and at the time of making the said letters patent, found out and invented any new and improved machinery, as in the letters patent and specification was alleged; secondly, whether the said alleged invention, in the said letters patent and specification mentioned, was, before and at the time of making the said letters patent, of much or any public benefit or utility, as in the said letters patent was alleged. And the judge who tried the cause was to be at liberty to indorse special matter on the *postea* as he should think fit.

The issues were tried at the *York* Assizes, 1836, before *Parke*, B., and a verdict was found for the plaintiff on both issues, with the following endorsement on the *postea*:—

"That before the granting of the patent, flax, hemp, and other fibrous substances, were spun with machines or slides, by which the reach was varied according to the length of the staple or fibre of the article to be spun, and that that had been a fundamental principle of dry spinning known and used before the granting of the patent, the reach having varied in cotton spinning, between seven-eighths of an inch and one and one-fourth of an inch; in flax or line spinning, from fourteen to thirty-six inches; in tow spinning, from four to nine inches; in worsted spinning, from five to fourteen inches. Before the granting of the patent, it was not known that flax could be spun by means of maceration, as having a short fibre, at a reach of two and a-half inches, or about those limits. But before that time *Horace Hall* had taken out a patent for the application of moisture in spinning flax, to separate the fibres, and reduce the length of the staple; and the machines manufactured according to that patent were constructed with the reach of four inches and three-quarters.

The question for the opinion of the Court was, whether the plaintiff's patent was valid in point of law.

The case was argued in last *Hilary* Term.

Sir *F. Pollock*, Q. C., for the plaintiff.—The special finding establishes that the *maceration* of flax for the purpose of spinning was new; and although the slides, by which the reach was varied, were previously used, yet their ap-

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plication to macerated flax was a decided improvement on the old system; plaintiff's machinery therefore was new, improved, and useful, in the terms of the issues. Upon the facts endorsed on the *postea*, only two objections can be raised; first, that the specification is void on the face of it; secondly, that the patent to *Hall* anticipated the plaintiff's. As to the first objection, there seems no pretence for saying that the specification is void, for it clearly and sufficiently points out a novel method for obtaining a useful result; and with regard to the second, *Hall's* patent was for a very different discovery, inasmuch as the mere *moistening* of flax is quite another thing from its *maceration*.

Sir *W. W. Follett*, Q. C. (*Wilde*, Serjt., with him).—The plaintiff's patent is void for this reason—it is taken out for "new machinery for macerating flax previous to drawing and spinning it, and also for improved machinery for spinning the same after it has been so prepared;" and the patentee fails in showing that he has invented new and improved machinery for these purposes, both of which he was bound to show in order to support his patent. Admitting that the process of macerating flax for the purpose of spinning, and the machinery adapted for such maceration, may be new, yet it is clear that the plaintiff has made no improvement in the machinery for *spinning* the flax, inasmuch as the moveable slides were in use for the purpose of spinning long before the plaintiff's patent. This part of the patent is, therefore, obviously bad; and as the entire discovery forms the entire consideration for the patent, if a material part of the alleged discovery fail, the whole patent is void. *Hill* v. *Thompson* (*a*), *Brunton* v. *Hawkes* (*b*). The specification is also void upon the face of it, by reason of its uncertainty, for no person upon reading it would perceive that it set forth any improvement in the art of spinning. *R.* v. *Wheeler* (*c*).

Pollock, in reply.—The patent is not taken out, as seems to be assumed on the other side, for two distinct processes, but for one entire invention—namely, for new and improved machinery in preparing and spinning flax, it being to be prepared by maceration, and spun at a reach of two and a-half inches. [*Vaughan*, J.—But this latter part it seems is not new. Does not the patentee say—my new method of preparing flax is by macerating it, and my improved method of spinning it is by adapting what turns out to be an old process?] There was no process previously known by which the same result could be produced as by that invented by the plaintiff; it is the combined process of which he claims to be the inventor.

Cur. ad. vult.

TINDAL, C. J., now stated the opinion of the Court.—In this case, which has been sent to this Court by his Honor the Master of the Rolls, the question as to the validity of the patent has been argued before us upon various grounds of objection; and, consequently, a certificate in the general terms of the question, that the patent does not appear to us to be valid in point of law, could not give satisfaction to the Court from which the question was

(*a*) 8 Taunt. 375; 2 Moo. 424; Holt. N. P. C. 636; 3 Mer. 629.

(*b*) 4 B. & A. 541. See also the judgment in *Bloxam* v. *Elsee*, 6 B. & C. 169; 9 D. & R. 215.

(*c*) 2 B. & A. 345.

sent. We, therefore, proceed shortly to state the grounds upon which our opinion is formed, that the patent in question is not valid in point of law.

The patent is taken out for "a new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power;" and the invention is declared, in the specification, to consist of "*new* machinery for macerating flax and other similar fibrous substances, previous to drawing and spinning it; and also of *improved* machinery for spinning the same, after having been so prepared."

Now, although the first part of the invention described in the patent, *viz.* the new machinery for macerating, appears from the facts stated in the case to be a proper subject for a patent, both with regard to the invention thereof being original, and in all other respects, yet the latter part of the patent, *viz.* the improved machinery for spinning flax, &c., does not, upon the facts stated in the case, and the description of the invention contained in the specification, appear to us to be a subject upon which a patent can by law be taken out.

The patentee in describing the improved machinery for spinning, which constitutes one part of his patent, informs the public "that he places the drawing rollers only two inches and a-half from the retaining rollers, and that this constitutes the principal improvement in the said spinning machinery." And he then proceeds to assign the reason and principle upon which the alleged improvement rests. And in a later part of the specification (when stating the extent of what he claims as his own invention in respect of improved machinery for spinning flax), he describes it to be "the wooden or other trough for holding the rovings when taken from the macerating vessels, and the placing of the retaining rollers, and the drawing rollers, nearer to each other than they had ever before been placed, say within two inches and a-half of each other, for the purpose aforesaid." So that, looking at the whole of the specification, it is not the use of the wooden or other trough as used by him upon which he relies, as indeed it obviously could not be, as an important invention, nor as the proper subject of a patent; but it is, "the placing and retaining of the respective rollers within two inches and a-half from each other," that forms the real subject-matter of the patent for the improved machinery.

Now, whether a patent can by law be taken out for placing the retaining rollers and the drawing rollers of a spinning machine (which machine was known and in use before) within two inches and a-half of each other, under the circumstances stated in the case, is the real question between the parties; and we think it cannot; for it appears from the endorsement upon the *postea*, that, before the granting of this patent, flax and other fibrous substances were spun with machines by which the reach was varied according to the staple or fibre of the article to be spun, and that that had been a fundamental principle of dry spinning known and used before the granting of this patent; and, further, that the reach used in cotton spinning had been less than two inches and a-half; the application, therefore, of two inches and a half to the spinning of flax, when in a state of *maceration*, by which the fibre of flax will not hold together beyond two inches and a-half, does not appear to us to be any new invention or discovery, but is merely the application of a piece of machinery already known, and in use, to the new macerated state of the flax. The fundamental principle of *dry* spinning was, that the reach varied according to the length of the staple or fibre of the article to be spun; and spinning machines were in use, either with the reaches

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fixed, or connected with slides, so that their distance might be varied according to the length of the fibre of the article intended to be spun; and, consequently, there is nothing new in applying the use of a spinning machine, with a reach of such a degree of shortness as will suit the continuity of the roving of the flax after it is macerated.

It is to be remarked that the application of moisture in spinning flax, for the purpose of separating the fibres and reducing the length of the staple, was not new in practice, but had been resorted under *Horace Hall's* patent, though in a different manner from that employed upon this occasion. Now, suppose a patent to have been first obtained for some entirely new method, either chemical or mechanical, of reducing the fibre of flax to a short staple, we think that a second patent could not be taken out for an improved mode of machinery in spinning flax, which consisted of nothing more than the spinning of the short staple of flax by a spinning-machine with a reach of a given length, not less than that already in use for the spinning of cotton; the effect of which would be, to prevent the first patentee from working his invention with the old machine at the proper reach. And if a patent taken out for that object separately would be invalid, so also a patent taken out for an invention, consisting of two distinct parts, one of which is that precise object, would be void also. The answer given to this objection on the part of the plaintiff has been, that the invention for which the patent has been taken out, does not consist of two distinct parts, but has but one entire single object only, namely, the object of macerating flax, and spinning that macerated flax on a machine where the rollers are retained at the prescribed distance from each other. But this appears to be at variance with the specification itself, which divides the invention and the subject-matter of the patent into two distinct parts; and even if it is to be considered as one entire invention, if part of what is claimed is not properly the subject of a patent, or not new, the whole must be void.

We shall, therefore, certify to his Honor, that, in our judgment, the patent in question is not valid in law.

Certificate accordingly.

May 8.

DEVAUX *v.* JANSON.

A policy of insurance was effected by the owners of a ship upon freight, at and from any port on the *Coromandel* coast, against perils of the sea and all other perils, &c. The ship having sprung a leak in her outward voyage put into a port on the coast of *C.*, and was hove into dock there for repair. During the progress of the repairs the owner purchased a homeward cargo, which was deposited in a warehouse seven miles distant from the dock, but was otherwise ready to be shipped. After the completion of the repairs, the ship was again damaged by a failure in the mechanical process used to remove her from the dock, (her sides being stove in by cables, or columns of sand, used for her support), whereupon, an abandonment was decreed, and she was broken up:—*Held*, first, that the plaintiff's interest in the homeward cargo was correctly described as *freight*; secondly, that as such cargo was ready to be shipped, and the ship was ready to receive it, the risk had attached at the time of the loss; and, thirdly, that the loss was occasioned by one of the perils insured against.

THIS was an action on a policy of insurance, dated 27th August, 1831, lost or not lost at and from *Calcutta*, "or any port or ports, place or places, all or any, and in any succession, on the *Coromandel* coast, to any port or ports, place or places in *Bourbon*, upon any kind of goods or merchandizes, &c., in the good ship or vessel called *La France*." The perils insured against were

"perils of the seas and all other perils, losses and misfortunes, that had or should come to the hurt, detriment or damage of the said goods and merchandizes, and ship, or any part thereof." And the policy was declared to be, "on 1,000*l.* on the *freight* of the said vessel, valued at 1,000*l.*" The declaration averred that the ship was in good safety at *Coringa*, and "and that divers goods and merchandizes, amounting to a full cargo of the said ship or vessel, which had been bought procured and contracted for, for and on account of the said persons so interested in the subject-matter of insurance as aforesaid, were at *Coringa* aforesaid, for the purpose of being shipped and loaded, and which, if it it had not been for the loss thereinafter mentioned, would have been shipped and loaded in and on board of the said ship or vessel, to be carried and conveyed therein on the said voyage in the said policy of insurance mentioned, to wit, from the *Coromandel* coast to *Bourbon* aforesaid;" and the declaration then proceeded to aver, "that whilst the said ship was at *Coringa* aforesaid, and during the continuance of the said risk in the said policy mentioned, the said ship or vessel was broken, damaged and destroyed and rendered wholly incapable of pursuing the said voyage, by certain perils, which the said assured by the said policy did take upon themselves, to wit, by the accidental breaking and giving way of the tackle and supports whereby the said ship or vessel was supported, in being moved from a certain dock; in consequence of which breaking and giving way, the said ship or vessel struck violently against the sand, and was bilged, broken, destroyed, damaged and rendered incapable of pursuing the said voyage, and the said ship or vessel, and the freight, and all benefit, profit and advantage, that the said persons so interested as aforesaid would otherwise have derived and acquired from the employment of the said ship or vessel in the carrying of the said goods and merchandizes on the said voyage, and the means of carrying and conveying the same were, by the means aforesaid, wholly lost.

The defendant, by his *second plea*, denied "that at the time of the loss in the declaration mentioned, the risk in the said policy mentioned had commenced, or the said writing or policy of assurance had attached;" upon which issue was joined.

By the *third plea*, he alleged "that the ship was not, at the time of the commencement of the risk insured against by the said policy, seaworthy; upon which also issue was joined

By the *fourth plea*, he traversed the allegation, "that the ship was broken, damaged, and destroyed, and rendered incapable of pursuing the voyage by any perils which the said assured by the said policy did take upon themselves;" and,

By the *fifth plea*, he traversed "that the ship was at any time after the making of the policy and before the loss, in good safety at any port or place on the *Coromandel* coast, in the said policy mentioned," on each of which traverses respectively issue was taken.

A verdict was found for the plaintiff, damages 200*l.*, subject to the opinion of the Court upon the following Case; and it was agreed that, upon matters of fact in the case, the Court should be at liberty to draw the same conclusion as in their judgment ought to be drawn by a jury:—

The ship, *La France*, mentioned in the policy, sailed from *Havre* in the early part of *December*, 1830, upon a voyage to and in the *Indian Ocean*, under the direction of *M. Samoise*, as supercargo and general agent of the owner,

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Previous to her sailing she was carefully surveyed by competent persons, and reported to be perfectly staunch and seaworthy. She soon met with very rough weather, in consequence of which she sprang a leak. About the end of *March*, 1831, she arrived at *Bourbon*, where she was surveyed by a commission out of the Admiralty Court of *St. Denis*, in that island. It appeared that the leak had been caused by a bolt becoming loose between the ribs on the starboard side on the lower floors. Under the authority of the Admiralty Court she underwent a temporary repair, the completion of the repairs being postponed until the arrival of the ship in *India*, in consequence of there being no convenience at *Bourbon* for getting at the botton of the ship, and it being impossible to do the repairs necessary to stop the leak whilst she lay in the roadstead. The Court, therefore, declared that it was necessary to take the vessel to *India*, in order that she might there be hove down, and the leak be repaired on the outside; and they authorized the captain to proceed to *India* for that purpose. About the 18th or 20th of *April*, 1831, she left *Bourbon*, and it was sworn by the supercargo, who was on board, that the leak was much diminished by the temporary repair at *Bourbon*. On passing near *Ceylon* the vessel struck violently two or three times upon a bank off *Point Pidre*, on the 24th of *May*, 1831. She arrived at *Coringa*, a small *English* port and station on the coast of *Coromandel*, in *India*, on the 6th of *June*, 1831, and having been unballasted, was surveyed under the authority of the local tribunals, agreeably to the *French* law. The surveyors reported as the fact was, that the leak, which the captain had been authorised by the Marine Court of *St. Denis* to come to one of the ports in *India* to repair, still existed, and that it proceeded from the lower floors, although the vessel was entirely unballasted; in consequence whereof they authorized the captain to take his ship up the river, and thence into a dock, as is customary in that country, in order to repair the damages the ship might have sustained, which could not be ascertained until the ship was put into a dry dock. She was accordingly taken up the river, and it was necessary to lodge her in a dock where her bottom could be worked upon. The usual and proper mode of taking a vessel into dock for repair, and out again, at *Coringa*, and which was pursued on the present occasion, is as as follows:—It is necessary to make an excavation in the dock, as, in consequence of its being seldom used, the sea is allowed to flow into it, whereby a deposit of soft mud is formed; when the excavation has been made, and the hard bed of sand at the bottom of the dock arrived at, the ship is hauled head foremost into the open space thus afforded; two lines of bamboo stakes are then driven into the mud across the entrance of the dock, the space between the two rows of stakes being filled up with earth thrown out of the dock, which is thus closed from the sea, although a quantity of water still remains at the bottom; the natives again throw in the soft mud and soil, which has the effect of raising the ship, and then the water which has remained when the dock is closed, is baled out of the dock into the sea; piles are then driven into the mud on each side of the vessel, and, being driven down to the hard bottom of the sand, they form a good support for the vessel. The mud is then cleared sufficiently to admit of the vessel being inspected and repaired. When the vessel has been repaired, she is brought again into water in the following manner: four thick columns of earth are formed under the vessel; they are each bound round with a coil of cable made of cocoa-nut fibre, and then the piles being removed the vessel rests on these columns so bound; the water is then again let

into the dock by re-opening the entrance; the cables are uncoiled by degrees, the vessel is gradually let into the water, and she is then floated out.

What was necessary to be done to raise and place the *La France* in the dry dock in a state for repair in the manner before described, was all completed about the third or fourth of *August*, and the vessel was then lying in the dry dock, open to inspection of her bottom. Immediately afterwards the repairs were commenced.

About two days after she had entered the river, *viz.*, on the 22nd of *June*, *Samoise* had commenced the purchase of the ship's return cargo for *Bourbon*, and before the completion of the repairs he had purchased the whole. It consisted of rice, buffalo horns and hides, and it was safely deposited in certain warehouses at *Jaggernackfoeran*, which is distant seven miles from *Coringa*. The purchases were made on account of a person mentioned in the declaration as interested, who was the owner of the ship.

It was sworn by the supercargo, who was at *Coringa* at the time, that on the 14th of *August*, the ship was quite ready for sea, and might have been got afloat in a couple of hours; and it was reported by the surveyors who made a survey on the 14th of *August*, that those repairs had been properly executed, and that the ship was in a fit condition to go to sea. But, in a petition presented by *Cæsar Dejoly*, the master of the ship, on the 17th *August*, 1831, to the President of the Tribunal of Commerce, he stated that on the 14th *August*, the repairs, on account of which the ship had entered the river *Coringa*, and gone into dock, being *on the point of conclusion*, the workmen charged with putting the ship in order, to get her out of dock made their preparations. On the last-mentioned day, preparations were actually made for putting the vessel in readiness to go out of the dock, and four cables were placed and raised in a spiral form, the interior of which was full of a clayish mould, *viz.*, two forward, a little abaft the fore channels, and two astern, on the starboard and larboard sides, and about ten feet afore the mizen mast. The workmen then began to remove the sand which was under the vessel, and which consolidated the shores upon which the ship was still resting. As the work was going on progressively, it was perceived that the starboard fore cable more especially was straining the vessel; and immediately the captain communicated it to the harbour master, who assured him it was of no moment. At last, while the work was going on, at two o'clock in the afternoon of the 15th *August*, the evil increasing in the captain's judgment, he went on board the ship, accompanied by his mate and the ship's carpenter, to see whether any thing had given way. He then found that two ribs at the fastening of the starboard fore cable had broken already. He immediately wrote to the captain of the port of *Coringa*, entrusted with the repairs of the vessel, to come to the spot without loss of time, in order to remedy the damage, if it were possible. He consulted with the harbour master, and it was decided by them, that, as the vessel could not remain in the position in which she was, it was indispensable to lower her entirely, by removing the shores from under the keel. The next day, the 16th *August*, this was done; but, during that operation, the two stern cables and the larboard fore cable were forcing in the ribs and thick stuff, although they had been pillared the evening before against the barlings of the hold and between decks. The stauncheons of the kelsons having all fallen from the force of the lower masts upon the keel, the garboard streak gave way nearly from end to end, and when, at last, the ship was no longer upon the shores, she sank into a muddy sand, when it was found impossible to re-

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At the time of her sustaining the injury, the depth of water in the dock was about four feet.

A survey was made of the fresh injuries she had sustained on the 30th *August*; it appeared that the cost of the repairs would amount to considerably more than the worth of the vessel; that no money upon bottomry or otherwise could be borrowed for the purpose of executing these repairs; and that eight months' time would be required to procure the necessary materials for the repair from other places.

On the 31st *August* the President of the *Tribunal du Premier Instance* at *Janson*, a *French* factory, situate about three miles from *Coringa*, directed an abandonment of the vessel, and that such abandonment was necessary. She was then broken up and sold.

The cargo which had been purchased for the *La France* was shipped on board an *English* vessel, and by her conveyed to *Bourbon*, and above 6,000 rupees were paid to the captain of that ship for the freight thereof.

Wilde, Serjt. (with *Maule*, Q. C., and *Barstow*) for the plaintiff.—The defendant relies upon two principal objections against the plaintiff's right to recover in this case; first, that the policy on freight never attached, and secondly, that even if it had attached there was no loss by any of the perils insured against by the policy (*a*).

The first objection raises two distinct questions; first, whether the word *freight* in the policy is sufficient to cover the plaintiff's interest; and, secondly, whether that interest had commenced at the time of the loss. As to the first of these questions, the goods that were to form the homeward cargo were purchased by *Samoise* on behalf of the plaintiff as shipowner, and the case of *Flint* v. *Flemyng* (*b*), has expressly decided that under the term *freight* may be insured the benefit which a ship owner would derive from carrying his own goods in his own vessel.

The next question is, whether the interest of the plaintiff had commenced and the policy attached at the time of the loss. The principle deducible from all the cases is, that where a contract has been entered into for the shipment of goods, and such goods are ready to be put on board, and the ship is in a state to receive them, if the owner is prevented from carrying freight by reason of one of the perils insured against, this is a loss within the terms of the policy. *Montgomery* v. *Eggington* (*c*); *Thompson* v. *Taylor* (*d*); *Horncastle* v.

(*a*) Another question was raised by the issue on the third plea, *viz.*:—As to whether the ship was seaworthy at the time of the inception of the risk; but as the point was abandoned by the defendant's counsel, the argument is not reported; the following authorities, however, were cited by *Wilde*, Serjt., for the plaintiff:—*Parmeter* v. *Cousins*, 2 Camp. 235; *Bell* v. *Bell*, 2 Camp. 475; *Annen* v. *Woodman*, 3 Taunt. 299; *Smith* v. *Surridge*, 4 Esp. 25; *Forbes* v. *Wilson*, and *Hibbert* v. *Martin*, 1 Park Ins. 344.

(*b*) 1 B. and Ad. 45.

(*c*) 3 T. R. 362; where it was held that the assured upon a valued policy on freight is entitled to recover the whole amount, though part of the goods only were on board at the time the ship was lost, the rest being ready to be shipped.

In an *American* case upon a policy on freight from *New York* to *Wilmington*, and thence to *Barbadoes*, the assured had bought a cargo of staves, which were to be taken on board at *Wilmington* had not the vessel been lost on the way thither;—Mr. J. *Warlington* held that the interest in the whole freight commenced at the time of the vessel's sailing from *New York*. *Hart* v. *Delaware Insurance Company*, Marsh. Ins. by Condy, 281, n; Wharton's Digest, 337, No. 186; 1 Phillips on Insurance, 133.

(*d*) 6 T. R. 478.

Suart (*e*); *Forbes* v. *Aspinall* (*f*); *Truscott* v. *Christie* (*g*); *Parke* v. *Hebson* (*h*); *Davidson* v. *Willasey* (*i*); *Warre* v. *Miller* (*k*); *Camden* v. *Cowley* (*l*); *Williamson* v. *Innes* (*m*).

The second objection is, that the loss was not occasioned by any of the perils insured against. The words of the policy are sufficiently large to comprehend the cause of the loss in this case, which was not occasioned by negligence or unseaworthiness, but by a failure of the mechanical means employed to get the vessel out of the dock; and in similar cases such a loss has been held to be covered by the general words of the policy, as where the loss was occasioned by the not casting off a rope, *Hodgson* v. *Malcolm* (*n*), or by the breaking of a rope, *Bishop* v. *Pentland* (*o*), or by the vessel's taking the ground at the fall of the tide and bilging, *Carruthers* v. *Sydebotham* (*p*), *Fletcher* v. *Inglis* (*q*); or by her being thrown on her side by the wind, *Phillips* v. *Barber* (*r*); or by a fire occasioned by the negligence of the crew, *Busk* v. *the Royal Exchange Ass. Co.* (*s*); or by a peril of the sea, though the remote cause was the negligence of the crew, *Walker* v. *Maitland* (*t*); or by the ship's being fired into by mistake, *Cullen* v. *Butler* (*u*).

Sir *W. W. Follett*, Q.C., (with *R. V. Richards*) for the defendant.—First, if Court considers themselves bound by *Flint* v. *Flemyng*, it is certainly impossible to distinguish that case from the present; but if that case is law it places the underwriter almost entirely at the mercy of the shipowner.

Secondly, the policy would not attach unless the shipowner were in a situation to maintain an action against the owner of the goods for not shipping them; and such an action would not be maintainable in this case, for the vessel was not in fact in a condition to receive the goods. In *Tonge* v. *Watts* (*v*) it

(*e*) 7 East, 400.
(*f*) 13 East, 323.
(*g*) 2 B. & B. 320; 5 Moo. 33.
(*h*) Cit. 2 B. & B. 326; 5 Moo. 41.
(*i*) 1 M. & S. 313. In this case a ship was chartered from *Liverpool* to *Jamaica*, there to take on board a full cargo for *Liverpool* at the current rate of feight, to be paid at one month from the discharge of her cargo at *Liverpool*; the shipowners effected a valued policy on the freight at and from *Jamaica* to her port of discharge in the *United Kingdom*. The ship arrived at *Jamaica*, and *after taking on board one half of her cargo* was lost by storm, *the remainder of her cargo being* on shore, and *ready to be shipped*; and the court *held* that the assured were entitled to recover as for a total loss. The Supreme Court in *New York* has recognized the principle which governed this case, namely, that the owner of a ship being a charter party, by which a freight is secured, has an insurable interest as soon as he has done something under the charter party, and is ready to proceed in the execution of it on his part. The owner of the ship *Olive Branch* let her by charter party for a voyage from *Bourdeaux* to *New York*, *Buenos Ayres*, and back to *Europe*, for the entire sum of 18,000 dollars. The ship had arrived at *New York* in the prosecution of the voyage, where she was detained by an embargo, after her cargo had been discharged, and before the cargo for *Buenos Ayres* was put on board. C. J. *Kent*, in giving the judgment of the Court, said, "the risk had attached on the whole freight. The charter party gave an entirety to the contract of freight." *Livingston* v. *Colonial Insurance Company*, 3 Johns. R. 49; 1 Phil. Ins. 135.
(*k*) 4 B. & C. 538; 7 D. & R. 1.
(*l*) 1 W. Bl. 417.
(*m*) 1 Moo. & Rob. 88; 8 Bing. 81 n.
(*n*) 2 N. R. 336.
(*o*) 7 B. & C. 219; 1 M. & R. 49.
(*p*) 4 M. & S. 77.
(*q*) 2 B. & A. 315.
(*r*) 5 B. & A. 161.
(*s*) 2 B. & A. 73.
(*t*) 5 B. & A. 171.
(*u*) 5 M. & S. 461; 4 Camp. 289.
(*v*) 2 Stra. 1251.

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was held that the goods must be actually on board before the assured's right to freight would commence; that case has never been overruled, and at any rate it is clearly necessary that both the ship should be ready to receive the goods and the goods ready to be put on board; but neither of these facts existed in this case; the ship, as before stated, not being in a situation to receive the goods, and the goods, which were ordered while she lay in the dock, being in fact seven miles off when the loss occurred. The authority of *Montgomery* v. *Egginton* (which seems opposed to *Tonge* v. *Watts*,) was a good deal shaken by Lord *Ellenborough* in *Forbes* v. *Aspinall*, where his Lordship intimates (*w*) that if the former case is to be supported it must be on the ground that "a full cargo was ready to be laden, and the ship in a state to receive it, and nothing but the perils insured against did, or (as appears) could prevent its being received." In *Forbes* v. *Aspinall*, his Lordship observed, "it was uncertain whether any additional cargo could have been ever procured, and the outward cargo must also have been discharged before the homeward cargo could have been completed; so that the ship was not even in a condition to receive her homeward cargo, if the cargo had been ready, which it never was, to have been put on board." In this case also the ship had not in fact completed her outward voyage; she was in a course of repair, and she put into *Coringa* for that purpose, and not to receive a homeward cargo. A vessel under repair clearly cannot be considered as lying in port in a state fit for sea, as was stated by *Tindal*, C. J., in *Palmer v. Marshall* (*x*); the same doctrine is recognised in *Williamson* v. *Innes*.—[*Vaughan*, J.—Is that case reconcileable with *Truscott* v. *Christie*?] If not, it is submitted that the last-mentioned case is not law. The authority of *Horncastle* v. *Suart* also was doubted by Lord *Ellenborough* in *Forbes* v. *Cowie* (*y*), which is an authority in favour of the defendant on this point, as are also *Sellar* v. *M'Vicar* (*z*) and *Curling* v. *Long* (*a*). The cases relied on by the other side are all distinguishable from the present.

Thirdly, the cause of the loss was not a peril *ejusdem generis* with those insured against; "all other perils" must mean perils of the like nature as perils of the sea; the loss here was occasioned by the inefficiency of the means resorted to to remove her from the dock. The case bears a close resemblance to *Thompson* v. *Whitmore* (*b*), where a ship hove down on a beach within the tideway to repair was thereby bilged and damaged, and it was held not to be a loss by the perils of the sea. In this case neither the winds or waves were agents in the destruction of the vessel. *Cur. ad. vult.*

TINDAL, C. J., now delivered judgment. After stating the pleadings *(as ante*, pp. 82, 3*)*, his Lordship proceeded:—

Such being the state of the pleadings, two main and principal objections against the plaintiff's right to recover any loss on this policy have been raised and argued before us, *viz.*:—First, that under the facts stated in this special case, the policy on the freight never attached; and, secondly, that supposing the policy to have attached, there was no loss within the policy by any of the perils therein insured against.

The first objection involves two distinct and separate heads of consideration;

(*w*) 13 East. 331.
(*x*) 8 Bing. 79; 1 Mo. & S. 161, 163.
(*y*) 1 Camp. 520.
(*z*) 1 N. R. 23.
(*a*) 1 B. & P. 634.
(*b*) 3 Taunt. 227.

First, whether the interest of the assured in the subject matter of insurance is properly described in the policy as *freight;* and secondly, if such description is sufficient in the policy, then, whether the interest of the assured in the subject matter of the insurance had commenced before the loss happened.

But we consider the first question to be set at rest by the decision of the Court of *King's Bench*, in *Flint* v. *Flemyng* (*c*), and hold it to be now established law that the assured under an assurance upon freight may recover the profits expected to be made by carrying their own goods in their ship upon the voyage insured.

The second head of inquiry may be subject to some degree of doubt and difficulty; but, upon the whole, we concur in opinion, that under the circumstances stated in the case, the interest of the assured had commenced and the policy had attached at the time the loss took place.

The argument which has been mainly relied upon, on the part of the underwriters, is this:—That, in order to enable the assured to recover a loss upon a policy on freight, there must be a cargo either actually put on board, or ready to be put on board under a contract for that purpose; and, in the latter event, the ship must also be ready to receive the cargo; and in this case it is contended by the underwriters, that by reason of the loss of the ship before she was out of dock, and actually afloat, she was never in a condition or ready to receive the goods on board; the defendant relying on the expression used by Lord *Ellenborough*, in giving the judgment of the Court of *King's Bench*, in *Forbes* v. *Aspinall* (*d*), that in order to recover on a policy on freight, a full cargo must be ready to be shipped, and the ship must be in a condition to receive the cargo. The proposition that the ship must be ready to receive her cargo, had, in that case, an immediate bearing and application to the facts then before the Court, for the policy was on freight upon the homeward voyage, and the homeward cargo, and the whole of the outward cargo had not been bartered at the time of the loss, part of it being still on board, so that it was impossible, under those circumstances, that the homeward cargo could be received on board the ship at the time of her loss. In that case, therefore, the loading of the homeward cargo on board, upon which depended the attaching of the policy and the commencement of the right of the assured to the freight, was not prevented by any of the perils insured against by the policy, as the proximate and immediate cause of such prevention, but by a cause altogether without the risks included in the policy, namely, by the inability of the ship to receive the cargo on board; whereas, in the case now before us, it appears that the ship was, on the 14th of *August*, quite ready to go to sea, and to receive the cargo on board, that nothin remained to prevent her sailing but the getting her out of dock, and that the loss of the ship and consequent inability to receive the cargo was occasioned solely by the endeavour to get her out of the dock and afloat in the river. If, therefore, the loss of the ship in this case was occasioned by any of the perils within the meaning of the policy the case is distinguishable from that of *Forbes* v. *Aspinall* in this, that the immediate cause of prevention of taking the goods on board was not occasioned by the inability of the ship to receive the cargo, but by the ship being disabled to receive the cargo by one of the perils insured against. For, so far as relates to the cargo, we think it must be considered as in a sufficient state of readiness to be put on board; it was pur-

(*c*) 1 B. & Ad. 45. (*d*) 13 Ea. 323.

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chased by the assured for the express purpose of the adventure mentioned in the policy; it was comparatively useless for any other purpose, and the whole of the purchase was completed before the repairs were finished, and although it had been deposited in warehouses at seven miles distance, yet it was deposited there for the purpose of being put on board; and it is impracticable, as it appears to us, to lay down any precise rule as to the distance within which the cargo must be from the ship at the time of the loss, whether close to it, upon the quay, as in the case of *Flint* v. *Flemyng*, or at a more considerable distance, as in the present case. All that it seems necessary to determine with respect to the cargo being, that it must have become the property of the parties insured, by a contract made with a view to its being sent on board, and actually in a state of readiness, (reference being had to the nature and description of the voyage insured), to be put on board when the ship arrives at the place of deposit.

The point remaining to be considered is, whether the loss was occasioned by any of the perils insured against by the policy. It is to be observed the words in the policy are very large; the policy not only enumerates "perils of the sea," but "all other perils, losses, and misfortunes, that had or should come to the hurt, detriment, or damage of the subject matter of insurance." And the cases cited and relied upon by the plaintiff, *Carruthers* v. *Sydebotham*, *Fletcher* v. *Inglis*, and *Phillips* v. *Barber*, are sufficient authority to show that a loss occasioned by the endeavour to get the vessel afloat from the dock, in which she had just been repaired, was a loss within the policy. Indeed the difficulty which has arisen upon this point in former cases, has rather turned upon the question, whether such a loss was properly described in the declaration as a loss by perils of the sea, than upon any doubt as to its falling within the general terms of the policy; and in the present case that difficulty is avoided by the mode in which the loss is described in the declaration.

We do not feel ourselves called upon to enter into the question of sea-worthiness, under the third issue; or of the safety of the ship under the fifth; because the objection of the want of sea-worthiness has been virtually, and we think properly, upon the facts stated in the case, abandoned in the course of the argument; and as to the fifth issue, no point was made before us: but we think, upon the two main points which have been argued before us, the plaintiff is entitled to our judgment, and direct the verdict to be entered accordingly.

Judgment for the plaintiff. (*e*)

(*e*) This case was argued last *Hilary Term*.

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The defendants sold some wheat to the plaintiffs, which was to be shipped and forwarded to them, and by the contract of sale the plaintiffs, upon receipt of the invoice and bill of lading, were to transmit a banker's draft to the defendants for the amount. The wheat was shipped, and the invoice and bill of lading forwarded to the plaintiffs, but they, instead of a banker's draft, transmitted an acceptance of their own for the amount; whereupon the defendants stopped the wheat in the hands of carrier, and resold it to another party:—*Held*, that even supposing the right of *property* in the wheat had vested in the plaintiffs, as the right of *possession* had not (by reason of the non-payment by them according to the contract,) they could not maintain *trover* for the conversion of the wheat by the defendants.

CASE, with a count in *Trover* for six hundred quarters of wheat.

Plea to that count that the wheat therein-mentioned was wheat which, before the time of the supposed grievances in that count mentioned, to wit, on the 25th *October*, 1836, the plaintiffs had bargained to buy of the defendants, and the defendants had bargained to sell to the plaintiffs, at and for a certain price in that behalf agreed, to wit, for the price of 51*s*. per quarter, on board, upon certain terms and conditions for the payment thereof, to wit, that the payment thereof should be made by a banker's draft on *London*, at two months' date, to be remitted by the plaintiffs to the defendants upon receipt by the plaintiffs of the invoice and bill of lading; that afterwards, and before the time of the supposed grievances, in the second count mentioned, to wit, on the 27th *October*, in the year aforesaid, the defendants, in pursuance of the said bargain, shipped the said wheat in and on board of a certain ship or vessel called the *Ramsgate*, of which one *William Lightowler* was the master and commander, to be conveyed to a certain place, to wit, to *Maidstone*, in the county of *Kent*, to be there delivered to the plaintiffs, according to and subject to the terms and conditions of the said bargain, for the sale of the said wheat, and for the payment of the price thereof as aforesaid; that the said *William Lightowler* then made a certain bill of lading of the said wheat, and thereby acknowledged the shipping and delivery to him of the said wheat on board the said ship or vessel, and undertook, on the arrival of the said ship or vessel at *Maidstone*, to deliver the said wheat to the order of the defendants; that the defendants then also made an invoice of the said wheat, and sent and dispatched the said invoice and bill of lading to the plaintiffs, and the plaintiffs afterwards, to wit, on &c., received the invoice and bill of lading; yet that the plaintiffs did not, nor would, upon receipt of the invoice and bill of lading, remit, or offer or tender to remit to the defendants any banker's draft on *London*, but on receipt of the said invoice and bill of lading wholly failed and neglected to do so, contrary to their agreement in that behalf; whereupon the defendants caused and procured the said wheat to be detained on board the said ship or vessel, and hindered and prevented the wheat from being delivered to the plaintiffs, as the defendants lawfully might for the cause aforesaid; which were the said supposed grievances and conversion in the said second count mentioned.—*Verification*.

New assignment, that in the said second count the plaintiffs declared against the defendants, not for the grievances in the last plea mentioned, and therein attempted to be justified, but for this, that, although after the making of the said bill of lading in the plea last mentioned, by *William Lightowler*, for the delivery of the wheat to the order of the defendants, as in that plea mentioned, the defendants indorsed the said bill of lading to the plaintiffs, and sent the same so indorsed to the plaintiffs: and, although in the invoice so made by the defendants, and by them sent and dispatched to the plaintiffs, as in that plea also mentioned, the wheat was stated

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and expressed by the defendants to be shipped for the account and risk of the plaintiffs; and although, on the occasion of the shipping of the wheat to be conveyed by the plaintiffs, as in that plea also mentioned, to wit, on &c., the defendants also caused the said wheat to be insured for and on account, and at the proper costs and charges of the plaintiffs, and then sent the policy of insurance whereby the said wheat was so insured, together with the said invoice and the bill of lading, so indorsed as aforesaid, to the plaintiffs, who then received the policy and the invoice and bill of lading so indorsed to them, and from the time of the receipt of the same hitherto had been, and still were the holders thereof respectively; and, although the plaintiffs, at the time of the stoppage of the wheat in the plea mentioned, were not, nor had they at any time since been, bankrupt or insolvent, or unable to pay for the said wheat; of all which the defendants then always afterwards had notice, yet the defendants, well knowing all and singular the premises, forthwith upon the stoppage of the wheat, and before the lapse and expiration of a reasonable time for the plaintiffs to remit to the defendants a banker's draft on *London*, according to their contract in that behalf, as in the said plea mentioned, to wit, on &c., wrongfully and injuriously, without the consent and against the will of the plaintiffs, did wholly revoke and rescind the sale of the wheat to the plaintiffs; and then immediately thereupon, without further notice to the plaintiffs, and without suffering or permitting the plaintiffs to pay them, the defendants, for the said wheat in manner aforesaid, or otherwise, and thereby to redeem the said wheat, and release and discharge the same from the supposed lien of the defendants thereon (as the plaintiffs were then and at all times afterwards ready and willing to do, and would otherwise have done, whereof the defendants then and at all times afterwards had notice), and without giving or allowing the plaintiffs a reasonable time or opportunity so to do, wrongfully and injuriously did then resume as their own the absolute property and dominion in and over the said wheat; and then, without the licence or consent, and against the will of the plaintiffs, unlawfully did dispose of the said wheat, and every part thereof, otherwise and to other persons than the plaintiffs, and to and for their own proper advantage and benefit, as their own absolute property, freed and discharged from all right, title, or interest of the plaintiffs, to or in the same or any part thereof, and thereby then converted and disposed of the said wheat to their own use in manner and form as in the second count of the declaration alleged, which grievances above newly assigned were other than and different from the grievances in the plea mentioned, and therein attempted to be justified.

Pleas to the new assignment:—*First*, that the wheat in regard to which the plaintiffs had above newly assigned the said several supposed grievances was wheat which, as in the defendant's former plea mentioned, to wit, upon the 25th *October*, 1836, and before the time of the several supposed grievances newly assigned, the plaintiffs had bargained to buy, and the defendants had bargained to sell to the plaintiffs, &c. (stating the contract and breach as in the former plea); whereupon the defendants, upon their stoppage of the said wheat, did revoke and rescind the sale of the said wheat to the plaintiffs, and resumed as their own the property and dominion in and over the said wheat, and did dispose of the same to and for their own proper advantage and benefit, as they lawfully might for the cause aforesaid.—*Verification.*

Second, that the said wheat mentioned by the plaintiffs, in newly assign-

ing the said supposed grievances, to wit, &c., was bargained to be sold to the plaintiffs, for the price and on the terms and conditions for the payment thereof in the plea to the second count mentioned, and was shipped on board the vessel as in that plea mentioned, to wit, on &c., that, although the bill of lading and invoice were sent to the plaintiffs, and received by them, to wit, on &c.; yet the plaintiffs, upon the receipt thereof, to wit, on &c., remitted to the defendants, instead of a banker's draft on *London*, a certain acceptance of the plaintiffs, for a certain sum of money, to wit, the amount of the price of the wheat, such acceptance not being a banker's draft on *London*, and such acceptance being so remitted and sent by the plaintiffs to the defendants as and for payment of the price of the said wheat, without the plaintiffs then promising, or giving notice, or in any way intimating to the defendants that they would or were about to remit to the defendants any banker's draft on *London* for payment of the price of the said wheat, and without asking for any further time for that purpose; whereupon, and upon receipt of the said acceptance of the plaintiffs, the defendants forthwith returned to the plaintiffs their said acceptance, and stopped the said wheat, and forthwith, upon their stoppage of the said wheat, did revoke and rescind the sale of the said wheat, and resume as their own the property and dominion in and over the said wheat, and did dispose of the same to and for their own advantage and benefit, as they lawfully might for the cause aforesaid.—*Verification.*

Demurrer, and joinder.

The case was argued at the sittings *in banc* after last *Hilary* Term.

Butt, in suppport of the demurrer, contended that as the plaintiffs (the vendees) were neither bankrupt or insolvent, the defendants (the vendors) had no right to stop the wheat *in transitu*, and that as the property therein had vested in the plaintiffs by the delivery to the carriers, the defendants could not rescind the contract and resume the property, and therefore that *trover* would lie against them for detaining the wheat. He cited *Alexander* v. *Gardner* (*a*), *Dutton* v. *Solomonson* (*b*), *Walley* v. *Montgomery* (*c*).

Greenwood, contrà, argued that by the new assignment the plaintiffs had precluded themselves from raising any question as to the rights of the defendants to stop the wheat *in transitu*; *Cheasley* v. *Barnes* (*d*); 1 *Wms. Saund.* 299. n. (6), *Bone* v. *Dawe* (*e*), *Norman* v. *Wescombe* (*f*):—that supposing the point to be open to argument the right of stoppage *in transitu* was a legal right, which might be exercised by an unpaid vendor in every case, whether the non-payment arose from the inability or the refusal of the vendee to pay for the goods; *Clay* v. *Harrisson* (*g*), *Ellis* v. *Hunt* (*h*), *Lickbarrow* v. *Mason* (*i*), *Ince* v. *Prescott* (*k*), *Burghall* v. *Howard* (*l*), *Wiseman* v. *Vandeputt* (*m*), *Oppenheim* v. *Russell* (*n*), *Owenson* v. *Morse* (*o*), *Stokes* v. *La*

(*a*) 1 Hodg. 147; 1 New. Ca. 671; 1 Scott, 630. 3 D. P. C. 146.
(*b*) 3 B. & P. 582.
(*c*) 3 East, 585.
(*d*) 10 East, 73.
(*e*) 1 Har. & Wol. 311; 3 Ad. & El. 710; 5 N. & M. 230.
(*f*) 1 M. & H. 18; 2 M. & W. 349.
(*g*) 10 B. & C. 99; 5 M. & R. 17.
(*h*) 3 T. R. 469.
(*i*) 2 T. R. 65; 5 T. R. 367, 683; 1 H. Bl. 357; 2 H. Bl. 211; 6 East, 20, n.
(*k*) 2 N. & K. 265.
(*l*) Cited 1 H. Bl. 365.
(*m*) 2 Vern. 203.
(*n*) 3 B. & P. 42.
(*o*) 7 T. R. 64.

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Riviere (*p*), *Dixon* v. *Yates* (*q*); but that at any rate *trover* could not be maintained in the present case, inasmuch as the property in the wheat was not altered till the actual delivery to the vendee, *Hunter* v. *Beal* (*r*), *Litt* v. *Cowley* (*s*), *Coxe* v. *Harden* (*t*), or even supposing that the right of *property* passed to the vendee by the contract of purchase and delivery to the carrier, that still he could only acquire the right of *possession* by payment of the purchase-price, and that the right both of property and possession must combine to make a party to maintain *trover*, *Bloxam* v. *Saunders* (*u*).

Cur. adv. vult.

TINDAL, C. J., now delivered judgment.—The second count in the declaration, upon which, and the subsequent pleadings thereon, the question before us arises, is a count in trover for 600 quarters of wheat. The defendants plead to that count that the plaintiffs had bargained to buy of the defendants, and the defendants had bargained to sell to the plaintiffs, the wheat in question, under a certain agreement as to the payment of the price, which is set forth in the plea, that the defendants shipped the wheat on board a vessel to be conveyed to *Maidstone*, and there delivered to the order of the defendants; and because the plaintiffs would not, on the receipt of the invoice and bills of lading, remit, or offer or tender to remit, to the plaintiffs any banker's draft on *London*, but wholly failed so to do, contrary to their said agreement, thereupon the defendants caused the wheat to be retained on board the said ship or vessel, and prevented the same from being delivered to the plaintiffs, as they lawfully might.

The plaintiffs new assign and allege that they brought their action as stated in the second count, not for the grievance mentioned in the plea above referred to, but because the defendants, without any bankruptcy or insolvency of the plaintiffs, and without any inability on their part to pay for the wheat, and before the lapse and expiration of a reasonable time for the plaintiffs to remit to the defendants a banker's draft on *London*, "unlawfully did dispose of the said wheat to other persons than the plaintiffs, and to and for their own proper advantage and benefit as their own absolute property, freed and discharged from all right, title, and interest of the plaintiffs."

The defendants plead to this new assignment two pleas; stating in the first, that the plaintiffs did not, on receipt of the invoice and bill of lading, remit, or offer or tender to remit to the defendants any banker's draft on *London*, according to the contract, but failed and neglected so to do; whereupon the defendants, on their stoppage of the wheat, revoked and rescinded the sale of the same to the plaintiffs, and resumed as their own the property and dominion in and over the said wheat, and disposed of the same for their own advantage; and in the other plea to the new assignment the defendants state, that the plaintiffs remitted to the defendants, instead of a banker's draft on *London*, an acceptance of their own.

To which pleas to the new assignment the plaintiffs demur.

By the new assignment, therefore, the plaintiffs have altogether passed by

(*p*) Cited 3 East, 397.
(*q*) 2 N. & M. 177; 5 B. & Ad. 313.
(*r*) Cited 2 T. R. 75.
(*s*) 7 Taunt. 169.
(*t*) 4 East, 211.
(*u*) 4 B. & C. 941; 7 D. & R. 396. As the judgment of the Court turned entirely on this latter point, it was not considered expedient to repeat the learned argument of counsel at length.

the grievances justified by the defendants in their plea to the second count, that is, the stoppage of the wheat *in transitu*, and complain only of the rescinding of the contract by the defendants, and of the resale of the wheat by them to other persons than themselves, the plaintiffs, forthwith upon their stopping of the said wheat, and before the lapse and expiration of a reasonable time for the plaintiffs to make such remittance according to the contract. And upon this state of the record, we think it is unnecessary to consider whether the pleas to the new assignment contain a legal justification or not, or to determine whether the defendants, upon the neglect of the plaintiffs to remit the draft upon the *London* bankers, had the right forthwith to rescind the sale; because it appears to us that the plaintiffs, under the circumstances pleaded and admitted on this record, are not in a condition to maintain an action of trover for the sale of the wheat. For, in order to maintain trover, the plaintiffs must not only have the right of property in the goods for which the action is brought, but the right to the possession also. And in that case, admitting that the contract of sale vested the property of the wheat in the plaintiffs, yet, before they acquired the right to the possession of the wheat, the plaintiffs were bound by the terms and condition of the contract, upon the receipt of the invoice and bill of lading of the wheat, to remit to the defendants a banker's draft on *London*, at two months' date, which they altogether failed to do. It was a condition obviously introduced for the security of the defendants, that they should not part with the possession of the wheat until the banker's draft was remitted; and for this purpose the receipt of the invoice and bill of lading by the plaintiffs, and the remitting of the banker's draft by them, are made by the terms of the contract concurrent acts, and consequently the entire failure in the performance of the latter act on the part of the plaintiffs prevented the right of possession of the wheat from vesting in them. The plaintiffs, therefore, according to the decision of the Court of *King's Bench*, in *Bloxam* v. *Sanders*, with the facts of which case those of the present very nearly agree, cannot maintain an action of trover against the vendors for reselling the goods, however they might have been able to have brought a special action upon the case against them for any damage sustained in consequence of the resale, without waiting a reasonable time for the remitting of the banker's draft. And this meets the justice of the case; for in such action they would recover only the damages actually sustained in consequence of the resale, which might be very small, and not as in an action of trover, the full value of the goods, for which they had not paid according to the terms of the contract.

We therefore give

Judgment for the defendants.

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May 1.

MULLINS *v.* SCOTT.

The defendant, in an action for assault, having obtained a verdict upon a plea of *son assault demesne*, the Court refused to enter a verdict for him also on the general issue.

TRESPASS for an assault. *Pleas* (1) not guilty; (2) ***son assault demesne.*** Verdict for the defendant on the second plea.

C. Jones moved to enter a verdict for the defendant on the first plea, also, on the ground that having obtained a verdict on a plea that went to the whole action, it was inconsistent that he should have to pay the costs of the first issue, which substantially had been found in his favour.

TINDAL, C. J.—The inconsistency is in pleading as the defendant has done. If he chooses to say he did not commit an assault, which by his next plea he acknowledges he did commit and justifies, there is no reason why he should not pay the costs of the issue, which he has unnecessarily put the plaintiff to prove. The verdict on the second issue will give him the general costs of the cause.

Per Curiam.

Rule refused.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Term, 2 Victoria, 1839.

The Judges who usually sat in *Banc* this Term, were TINDAL, C. J., VAUGHAN, COLTMAN, and ERSKINE, Js.

JAMES *v.* LINGHAM and another.

Common Pleas
May 22.

In *assumpsit* for 100*l.* for work and labour, the plaintiff delivered particulars, claiming 96*l.*, "being the balance due." The defendant pleaded *payment* of the 100*l.* mentioned in the declaration. It was proved that he had admitted the balance to be due; but he proved payment of sums more than sufficient to cover the sum claimed by the declaration:—

Held, that the plaintiff was not bound to new assign.

The doctrine of new assignment only applies where there is a possibility of mistake as to what the plaintiff's cause of action may be. (Per *Tindal*, C. J.)

DEBT for 100*l.* for work and labour as a solicitor, with a count upon an account stated.

Second plea, that after the 100*l.* in the action mentioned became due, &c., and after the accruing of the said causes of action, &c., and before the commencement of the suit, the defendants paid to the plaintiffs divers sums of money, amounting, in the whole, to the said sum of 100*l.*, in full satisfaction and discharge of the same, and of all damages sustained by the plaintiff by reason of the detention thereof, which sums of money the plaintiff accepted in such satisfaction and discharge as aforesaid.—*Verification.*

Replication, traversing the payment and acceptance of the 100*l.* in satisfaction and discharge of the said debt and damages.

The particulars of demand delivered by the plaintiff were as follow:—"This action is brought to recover 96*l.* 17*s.* 11*d.*, being the balance of an account of costs, due to the above named plaintiff, for work and labor done by the above-named plaintiff, as solicitor for the above-named defendants, in the Court of *Chancery*; but as the full particulars of the plaintiff's demand cannot be comprised within three folios, the above is such a statement of the nature of his claim, and of the balance due to him, as is prescribed by the

Common Pleas.

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rule of Court in such cases made and provided (*a*), and in pursuance of which the same is now delivered."

At the trial before *Bosanquet*, J., at the *London Sittings*, in last *Trinity* Term, it appeared that the plaintiff had transacted various business for the defendants; that an application had been made to one of the defendants for the balance claimed by the particulars, who made no objection to the amount, and promised to pay it. The defendants, on the other hand, proved a receipt in the plaintiff's writing for 216*l.* 5*s.*, whereupon it was contended on their behalf that the plea of payment had been proved, and that if the plaintiff had meant to go for more than that sum, he ought to have new assigned. The Judge, however, thought a new assignment was not necessary, and directed a verdict for the plaintiff, reserving leave to the defendants to move for a nonsuit.

Crowder, Q. C., had obtained a rule *nisi* accordingly, upon the authority of *Hall* v. *Middleton* (*b*).

Kelly, Q. C., and *James* now showed cause.—There is no reason why the plaintiff should new assign in this cause. It is not like a case where there are or may be two debts in question. The plaintiff here proceeds only for the balance of one entire debt. The effect of the particulars of demand is to restrict the plaintiff to the claim mentioned therein, and to give information to the defendants of the nature of that claim, the defendants here are informed that the plaintiff seeks to recover the *balance* of a debt, which *ex vi termini* imports that previous payments have been made. *Freeman* v. *Crafts* (*c*) is expressly in point. That was an action of debt for work and labour, the aggregate of the sums claimed being 30*l.* The defendant, as in this case, pleaded payment. It appeared at the trial that the plaintiff had done work to the amount of 107*l.*, and the defendant had made payments to the amount of 92*l.*, whereupon the jury gave the plaintiff a verdict for the balance of 15*l.*, and the Court held the verdict was right, and that it was not necessary for the plaintiff to new assign. "In a plea of payment," observed *Alderson*, B., "you undertake to prove that whatever demand the plaintiff can establish, you have paid him." *Hall* v. *Middleton*, cited on the other side, only shows that a new assignment *may* be used in *assumpsit*, but it goes no further. By the new rule of *Trin. T.* 1 *Vict.* (*d*), it is provided that it shall not be necessary for a defendant to plead payment of sums for which the plaintiff has given credit in his particulars. If the plaintiff in this case

(*a*) T. T. 1 W. 4, r. 6.

(*b*) 1 Har. & Wol. 531; 4 Ad. & El. 107; 5 Nev. & Man. 410.

(*c*) 1 Horn. & Hurls. 188; 4 M. & W. 4; 6 D. P. c. 698.

(*d*) "In any case in which the plaintiff (in order to avoid the expense of the plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money.

"But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums."

This latter branch of the rule does not appear to have been adverted to in the argument of this case.

had reason to suppose that any question would have been raised as to the application of the payment to the sums for which he gave credit, he might have applied for leave to increase the damages in the declaration, *Collins* v. *Aaron* (*e*).

Crowder, Q. C., and *Bayley* in support of the rule.—The question turns upon a point of special pleading. It must be borne in mind that the pleadings and the particulars of demand are two distinct matters. If it were not for the particulars in this case, it is clear that the plaintiff would have been bound to new assign. He claims a debt of 100*l*. The defendant pleads payment, and shows that he has paid a sum to cover that debt. If the plaintiff meant to say that that payment was applicable to another debt, or a former portion of the same debt, he should have new assigned; as if a plaintiff sue for an assault, and the defendant pleads that the alleged assault was committed in the execution of a writ, and the plaintiff replies *de injuriâ*; if the parties go to trial upon that issue, and it is shown that in fact the defendant had assaulted the plaintiff in the execution of a writ, the plaintiff will not be allowed to prove a different assault before the issuing of the writ (*f*). Wherever a new assignment would be good pleading, it is necessary; *Bowen* v. *Jenkins* (*g*); and that it would have been good in this case appears from *Hall* v. *Middleton*, and *Heydon* v. *Thompson* (*h*). *Freeman* v. *Crafts* appears to have been a very hasty decision.—[*Coltman*, J.—In the case you have put of an assault, suppose the declaration were for assaults committed on divers days and times, and the defendant were to plead that after the assaults mentioned in the declaration he had delivered a horse to the plaintiff, who had accepted the same in full satisfaction.]—That would be like the plea of *leave and licence*, to an action for several trespasses, and would fall within the principle of *Barnes* v. *Hunt* (*i*), where it was held that such a plea professes to answer all the trespasses which the plaintiff can prove within the terms of his declaration. The plaintiff in this case ought to have averred the part payment in his declaration, as was suggested by the Court in giving judgment in *Nicholl* v. *Williams* (*j*).—[*Bosanquet*, J.—Do you mean, that if a tradesman, such as a butcher, were to sue for a balance due to him, he must specially show all the previous payments that have been made?]—He ought to show what amount he really goes for. The particulars do not do this; they cannot be pleaded to; they are given for the defendant's benefit and information it is true, and the plaintiff cannot go beyond them, but they form no part of the pleadings, and cannot be incorporated with them, *Booth* v. *Howard* (*k*); *Meager* v. *Smith* (*l*); *Ferguson* v. *Mahon* (*m*); and this Court has held that a defendant cannot avail himself of them to prove a payment, unless he has put a plea of payment on the record, *Ernest* v.

(*e*) *Ante* vol. 1, p. 54; 4 Bing. N. C. 233; 5 Scott, 595; 6 D. P. C. 423.
(*f*) 1 Wms. Saund. 299, a. n. 6; Stephen on Pleading, 262, 3; 2d. edit.
(*g*) Will. Woll. & Dav. 511; 6 A. & E. 211; 2 N. & P. 87.
(*h*) 1 A. & E. 210; 3 N. & M. 319.
(*i*) 11 East, 451.
(*j*) 2 M. & W. 758—764.
(*k*) Will. Woll. & Dav. 54; 5 D. P. C. 438.
(*l*) 4 B. & Ad. 673; 1 N. & M. 449.
(*m*) Will. Woll. & Hod. 689; 1 P. & D. 194. "By the late rule (T. T. 1838), the particulars are part of the record, but they were not so previously."—Per *Patteson*, J., 1 P. & D. 195.

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Brown (*n*).—[*Bosanquet*, J.—That has since been regulated by the new rule]. (*o*)—The true test to apply to this case is to consider how the issue is to be found upon the plea of payment; the fact being that the payment has been proved as alleged.—[*Coltman*, J.—The question is, whether it *is* proved as alleged—whether it is a payment in satisfaction of *the* debt claimed by the declaration.]—The plea is in its terms as general as the declaration. They are both equally at large.

TINDAL, C. J.—It appears to me that this is not a case in which the plaintiff was compelled to new assign.

The object of a new assignment is to render that certain which the defendant, by his plea, has rendered uncertain; as where the defendant has pleaded what amounts to a good answer to what appears to be the cause of action upon the face of the declaration, as in the common case of an assault, where the defendant pleads he has made compensation for the assault: if in fact he has done so for some assault committed on the plaintiff, who is seeking to recover damages for another assault, he must new assign; so in the case of trespass to a close called *Dale*, if the defendant pleads that *Dale* is his own close, and in fact he should have a close of that name, the plaintiff must new assign that the trespass complained of was committed on his, the plaintiff's, close of *Dale*. The doctrine of new assignment only applies where there is a possibility of mistake as to what the plaintiff's cause of action may be: but looking at the evidence in this case—for we are called upon to decide after evidence—it is clear there can have been no doubt between the parties as to the nature of the plaintiff's claim, there being but one existing cause of action, namely, the balance of the plaintiff's account, which had been admitted by one of the defendants to be due. I cannot, therefore, see what there was to new assign.

It is said, however, that the declaration and plea here are both at large. Suppose that to be so, yet the terms of the plea are, that after the 100*l.* *mentioned in the declaration* became due, the defendants paid divers sums of money, amounting to *the said sum* of 100*l.*, in full satisfaction and discharge *of the same*. It follows then that if the payment was not made and received in satisfaction of the demand in the declaration, the plea is not made out, according to *Barnes* v. *Hunt*, within the principle of which, I think, the present case precisely comes.

BOSANQUET, J.—It did not appear to me at the trial that a new assignment was necessary, and I retain my opinion. No case has been cited to show that a new assignment is necessary in circumstances like the present; but, on the contrary, the case of *Freeman* v. *Crafts* is an authority the other way.

COLTMAN, J.—I entirely concur. It strikes me as a fallacy in the argument to say that the plea is just as general as the declaration. The plea is tanta-

(*n*) 3 Hodg. 79; 3 Bing. N. C. 674; 4 Scott, 385; 5 D. P. C. 637. See also *Kenyon* v. *Wakes*, Mur. & Hurl. 260; 2 M. & W. 764; 6 D. P. C. 105; *Coates* v. *Stevens*, 1 Gale, 75, 2 C M. & R. 118; 5 Tyr. 764; 3 D. P. C. 784; *Shirley* v. *Jacobs*, 1 Hodg. 214; 2 Bing. N. C. 88; 2 Scott, 157; 4 D. P. C. 136.

(*o*) T. T. 1 Vict. *ut antea*.

mount to saying that the defendant has paid the same identical sum which is demanded in the declaration; and this plea is not satisfied by proof of payment of something not demanded by the declaration. The case falls within *Barnes* v. *Hunt*.

ERSKINE, J.—I am of the same opinion. This is not like the case of two separate causes of action. There are not two debts due from the defendant; there is but one debt, which has been reduced by previous payment (*p*).

Rule discharged (*q*).

(*p*) In *Mills* v. *Fourkes*, *ante* 62; 5 N. C. 455; 7 Scott, 444, there was a debt due from the defendant to the plaintiff, part of which was barred by the statute of limitations; and the Court held that a payment made by defendant on the general account, though it might be appropriated by the plaintiff to the earlier portion that was barred by the statute, yet not having been paid expressly by the defendant on that account, it did but have the effect of taking such portion out of the statute, thus apparently *treating* the two portions of the debt as two separate debts, although the Court admitted that it was all one debt.

(*q*) See *Hill* v. *White*, *post*; S. C. 6 N. C. 26; 8 D. P. C. 12.

FENDALL *v.* NOKES.

May 23.

ASSUMPSIT for goods delivered. *Plea*, payment into Court of 10*l*. —*Replication*, damages *ultra*.

At the trial before *Bosanquet*, J., at the sittings in last *Trinity* Term, it appeared that the plaintiff was a hotel-keeper near *Westminster Hall*; that the defendant was an attorney, who had conducted a cause of Lord *Langford* v. *Barrett*, on behalf of his lordship; that on the day of the trial of that cause, the then plaintiff's witnesses, to the number of forty, had assembled in the now plaintiff's house; that his lordship had called there in the course of the morning, and said to his witnesses, in the presence of a waiter, "have what you please—make yourselves comfortable;" that a person who had answered to the name of "Mr. *Nokes*," afterwards came frequently backwards and forwards to the hotel while the witnesses were partaking of refreshments. The counsel for the defendant pressed for a nonsuit, upon the ground that there was no evidence of any credit given to the defendant; but the judge, being of a different opinion, the cause went to the jury, who returned a verdict for the plaintiff for 5*l*. Leave having been reserved to the defendant to move to enter a nonsuit,

In an action by a hotel-keeper against an attorney, for refreshments supplied to witnesses during the trial of a cause, it appeared that the party in that cause had been to the hotel and desired his witnesses to have what they wanted, and that either the defendant, or some one transacting the business on his behalf, had been backwards and forwards in the hotel while the witnesses were partaking of refreshments:—*Held* on a motion for a *nonsuit*, that there was *some* evidence to go to the jury that the

Atcherley, Serjt., had obtained a rule *nisi* accordingly.

R. V. Richards and *Humphrey* now showed cause, and argued that there was sufficient evidence to go to the jury; and besides, that the payment of the money into Court admitted that the credit had been given to some amount to the defendant; and the question to what amount was one for the jury.

Atcherley, Serjt., and *J. Henderson*, in support of the rule.—The attorney

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is a mere agent for the party in the cause, and is known to be so; and is, therefore, no more liable to pay for the refreshment of a witness, than for the expenses of his attendance, *Robins* v. *Bridge* (*a*). Supposing that it was the defendant who was present at the plaintiff's hotel, (which was not distinctly proved), that would not vary the case, or shift the credit, which had previously been given to Lord *Langford*, to the defendant. Payment of money into Court, except in cases of special contract, works no admission of liability, beyond the sum paid in, *Seaton* v. *Benedict* (*b*), *Ravenscroft* v. *Wise* or *Wylie* (*c*), *Long* v. *Greville* (*d*).

TINDAL, C. J.—If the question in this case were whether or not we should grant a new trial, I am not prepared to say that I should feel satisfied with the finding of the jury; but the verdict being below the amount for which a new trial can be granted, the question we have to look to is whether there is a total absence of all evidence to go to the jury; and I am certainly not prepared to say that such was the case. There was evidence that the defendant or his clerk came in and out of the hotel in the course of the day; and the fact indeed must have been so. There was no express evidence that Lord *Langford* had made himself liable, or that the credit had been given to him, and I cannot say that there was no evidence that the credit was given to the defendant. I think, therefore, the rule must be discharged.

BOSANQUET, J.—The only question is, whether I was bound to withdraw the case from the consideration of the jury; and there was, in my opinion, *some* evidence to go to them. There was no doubt that refreshments had been supplied to the witnesses, and the question was, on whose credit they had been so supplied. It cannot be supposed that the plaintiff would have a claim against each individual witness. It was admitted that the defendant was the attorney in the cause, and it was proved that either he himself, or some person who answered to his name and transacted his business, was present at the hotel. The expression used by Lord *Langford* was certainly a strong one; but he gave no orders to the waiters. I think, therefore, there was a case sufficient to go to the jury; and there is no complaint that it was not fully and properly left to them.

COLTMAN, J.—If this were a question whether a new trial should be granted, I should have no hesitation in thinking there ought to be one, upon the ground that the evidence greatly preponderated against the plaintiff; and, with great deference to the rest of the Court, I cannot but doubt whether there was even a *prima facie* case to go to the jury. It is not necessary to consider whether or not an attorney is primarily liable for refreshments supplied to witnesses; but I think that at any rate a tavern-keeper ought to inquire whether he sanctions the orders that were given by the different parties. No such proof was given in this case, the only evidence to affect

(*a*) Mur. & Hurls. 357; 3 M. & W. 114; 6 D P. C. 140.
(*b*) 5 Bing. 28; 2 M. & P. 66.
(*c*) 1 C. M. & R. 203; 4 Tyr. 741; 2 D. P. C. 676
(*d*) 4 D. & R. 632; 3 B. & C. 10. See also *Stoveld* v. *Brewin*, 2 B. & A. 116; *Meager* v. *Smith*, 1 N. & M. 449; 4 B. & Ad. 673, *Lacey* or *Lucy* v. *Walrand*, 3 Hodg. 215; 3 N. C. 841.

the defendant being, that some person, probably one of his clerks, went in and out of the hotel where the witnesses were, in the course of the day.

ERSKINE, J.—I am of opinion that this rule must be discharged. It is admitted that the defendant was the attorney to Lord *Langford*, whose witnesses at the trial of a cause, received refreshments in the plaintiff's hotel. That alone would certainly not be sufficient to charge the present defendant; there should either be shown an express order by him, or some conduct on his part, from which such an order might be implied, and when it was once shown that the attorney, or his managing clerk, was present in the hotel during the time that the refreshments were supplied to the witnesses, there was *some* evidence to go to the jury, from which they might imply an authority given by the defendant. I confess I cannot myself see the evidence on which they have found their verdict; but the question is, whether there was *any* evidence to go to them, and I certainly think there was *some*.

Rule discharged.

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May 23.

An attorney, who had been re-admitted in *K. B.* in 1823, omitted to take out his certificate till *January*, 1826; in *H. T.* of which year he was admitted (for the first time) in *C. P.*, on an affidavit that he was then an attorney of *K. B.* (which in fact he was not, by reason of the omission to take out the certificate for more than a year after his re-admission, under 37 *Geo.* 3, c. 90, s. 31):—*Held*, (in the absence of fraud, and after a lapse of 13 years), that, though his admission in *C. P.* was irregular, it was not void; and the Court refused to strike him off the roll.

THE facts of this case are so fully set out by the Lord Chief Justice in giving judgment, that it is unnecessary to repeat them here at length, but the following summary of the dates will be found useful:—

In 1810 (17th *May*) *Henry Wilton* was admitted an attorney in the *King's Bench*.

1813 (21st *April*) he first took out his certificate, which he continued regularly till 1820 (12th *November*), when his last certificate expired.

1823 (*T. T.*) he was re-admitted in the *King's Bench*,

1826 (10th *January*) he took out his certificate again.

1826 (*H. T.*) he was admitted (for the first time) in the *Common Pleas*, upon an affidavit that he was then an attorney in the *King's Bench*.

1831 he ceased to practice altogether.

1837 (*M. T.*) the Court of *Queen's Bench* (in a case of *Wilton* v. *Chambers*) (*a*) held, that by reason of his not having taken out his certificate for more than a year after his re-admission, under the 37 *Geo.* 3, c. 90, s. 31, he was not entitled to practise as an attorney, and that his admission was void. Upon this decision, Mr. *Wilton* struck Mr. *Chambers* off the roll of attorneys, and refused to restore him, unless he would pay the costs of the former to the latter for business done by him as such attorney, might be cancelled; and the Court, upon the ground stated above, made the rule absolute.

This decision proceeded upon the construction of the 31st sect. of 37 *Geo*

(*a*) Will. Woll. & Dav. 701; 7 A. & E. 524; 2 N. & P. 392. That was an application by Mr. *Chambers*, for whom *Wilton* had acted for several years as an attorney, that various securities, which had been given by the

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within a year from his re-admission in 1823, such re-admission was null and void, "or, in other words, that he was off the roll of attornies" of that Court.

Wilde, Serjt., had, in last *Easter* Term, obtained a rule *nisi*, calling upon *Wilton* (*b*) to show cause why his name should not be struck off the rolls of the attornies of this Court, on the ground that his admission had been obtained on an untrue statement that he was at that time an attorney of the Court of *King's Bench*.

Erle, Q. C., and *Shee*, in the same Term, showed cause upon affidavits, showing there had been no fraud practised by *Wilton*, in obtaining his admission into this Court. The 37 *Geo.* 3, c. 90, is a Revenue Act, and ought not to be extended to such a case as the present. [*Erskine*, J.—Ought not the affidavit, upon which Mr. *Wilton* obtained admission into this Court, to have stated that he still continued on the roll of attornies of the other Court?] Such is the practice now (*c*); but it was not so formerly; or even if it had been, Mr. *Wilton* would have had no scruple to have made an affidavit, at the time of his admission, to that effect, and would have been advised to do so, before the decision of the *Queen's Bench* in 1837. Since that decision a somewhat similar application had been made to the Master of the Rolls (*d*) in 1838, in *Exp. Chambers, Re Wilton*, in a cause of *Duffield* v. *Elwes* (*e*), between the same parties as in the present case, and arising out of the same circumstances; and the judgment of his Lordship in that case, though it does not conflict with the decision in the *Queen's Bench*, shows that he had no disposition to extend it, and it will apply strongly to the present case. In addition to the facts now before the Court, it appeared there that *Wilton* had been admitted a solicitor in *Chancery*, on the 5th *June*, 1810, (after his original admission in the *King's Bench*), and that he had been re-admitted a solicitor on the 10th *November*, 1826, (after his re-admission in

3, c. 90, which enacts, that "every person *admitted* into any of the Courts, who shall neglect to obtain his certificate for one whole year, shall be incapable of practising by virtue of such admission, and *the admission shall be null and void*, provided that nothing hereinbefore contained shall prevent any of the Courts from re-admitting any such person, on payment of the duty accrued since the expiration of the last certificate, and such further sum of money, by way of penalty, as the Court shall think fit."

The enacting part of this section, it will be observed, applies in terms to *admissions* only, and not to *re*-admissions; but the Court of *Queen's Bench* considered it to apply equally to both cases, if not even more strongly to that of *re*-admission, for they expressed their opinion, that an attorney, on re-admission, is bound to take out his certificate forthwith; and added "The Court deals with his application as made for re-admission to practice, and certainly would not grant the rule in any case if it was informed at the time that the attorney did not mean to practice for some time, for it could not then have any control over, or security for, his good conduct in the meantime."

(*b*) It appeared that some bills of costs of Mr. *Wilton's*, in a cause of *Paget* v. *Chambers*, were before the Master for taxation.

(*c*) See Chit. Prac. Forms, pp. 8, 9, and see the judgment *post*, p. 109.

(*d*) Lord *Langdale*.

(*e*) The facts and judgment in this case were referred to from the shorthand writer's notes; but it has since been reported, 2 Keen, 497.

King's Bench, and his original admission in *Common Pleas*) (*f*). He had afterwards transacted business for Mr. *Chambers* as a solicitor, and in *October*, 1836, that gentleman had obtained an order in the *Rolls* for the taxation of Mr. *Wilton's* bill of costs. A motion was afterwards made (*g*) on behalf of Mr. *Chambers*, to discharge such order (on an affidavit, that when it was obtained, he was ignorant of the facts), and to have it declared, that Mr. *Wilton's* re-admission as a solicitor, in *November*, 1826, was void, and that he was incapable of acting as a solicitor. The *Master of the Rolls*, in giving judgment, observed, "It has been determined, in the Court of *King's Bench*, that the re-admission of Mr. *Wilton*, as an attorney of that Court, in 1823, was void, in consequence of his neglect to take out his certificate for more than twelve months after the time of the re-admission. This reason is not applicable to the re-admission of Mr. *Wilton* as a solicitor of this Court. But it is argued that a re-admission implies, and can only be founded on, a valid original admission; and that the original admission of Mr. *Wilton*, in 1810, was, under the statute 37 *Geo.* 3, c. 90, rendered wholly void by his neglect to take out his certificate till *April*, 1813."

His Lordship then, after adverting more particularly to the terms of that statute, proceeded as follows:—

"Upon the construction of the statute, it has been decided, that the word *neglect* does not mean merely omission; it does not mean omission to take out the certificate whilst the party was not practising, or an omission occasioned by the negligence of a clerk or agent, but omission whilst practising, and attended by culpability (*h*). In that case, if the omission be continued for more than a year, the statute imposes an incapacity to practise by virtue of the omission, and makes the admission null and void; but at the same time gives the Court a power to re-admit, from which it plainly appears that the words 'null and void' are to be taken in a qualified sense. The statute, as was stated by Chief Baron *Richards*, in *Jones* v. *Stevens* (*i*), occasions a *suspension* of the capacity of the attorney or solicitor to act, but does not wholly destroy the character; it imposes on him the necessity of being re-admitted, rendering him incapable of practising until that be done.

"And accordingly the cases are very numerous in which attorneys and solicitors duly admitted, and having at first taken out their certificate, but afterwards omitted to do so for more than a year, have been re-admitted even

(*f*) It appears that the affidavit upon which Mr. *Wilton* was re-admitted a solicitor, stated that he regularly took out his certificate from the time of his admission (in 1810) until the year 1820; which was an obvious mis-statement (as he had not taken out his first certificate till 1813), which Mr. *Chambers's* counsel contended would, of itself, be sufficient to invalidate his re-admission. Mr. *Wilton's* counsel argued that it was not necessary to make any such statement, and that the inaccuracy was clearly referable to mistake. (See 2 Keen. 501, 504.)

This shows, however, that his re-admission as a solicitor was founded upon his original admission in *Chancery*, and not as his admission in the *Common Pleas* had been, on the fact of his being at that time an attorney in the *King's Bench*; but it does not appear from the report, whether his original admission in 1810 was founded upon his previous admission in the *King's Bench*, or upon the usual notices, &c.

(*g*) It appears from the judgment of Lord *Langdale* that this application was irregular in form, and should have been made by *petition*. (2 Keen. 508.)

(*h*) See *Exp. Matson*, 2 D. & R. 238.

(*i*) 11 Price, 263.

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without payment of arrears of duty, and without penalty, or with a nominal penalty.

"The cases in which no certificate has been taken out within a year after the admission are not numerous. In *Ex parte Jones* (*j*), Mr. Baron *Parke*, when a judge of the Court of *King's Bench*, considered an attorney, who had not taken out his certificate, and had not practised for more than a year after his admission, was entitled to take out his certificate without re-admission. In *Ex parte Nicholas*, (*jj*) Sir *Vicary Gibbs*, then Chief Justice of the *Common Pleas*, considered that in that case a re-admission was necessary; and in *Ex parte Adey*, a case which is not reported, I find that in the like circumstances, Lord *Eldon* considered that a re-admission was necessary, or at least proper.

"These are all the cases of which I am aware; and the question has been, not whether the admission had become absolutely null and void, but whether re-admission was or was not necessary. It was never suggested that an admission *de novo* was required.

"If re-admission was not necessary, Mr. *Wilton* practised regularly from 1813 to 1820, and was duly re-admitted in 1826. And if we suppose this to be a case in which re-admission was necessary, then whatever might be the effect of the transactions in which Mr. *Wilton* practised between the years 1813 and 1820, yet as he was re-admitted before he acted as the solicitor of Mr. *Chambers*, he was restored to a capacity to practise by that re-admission, unless he was guilty of some fraud in procuring it; and no evidence of such fraud is now produced.

"I am, therefore, of opinion, that this motion, so far as it seeks a declaration, that the re-admission of Mr. *Wilton* was void, and that he was incapable to act as a solicitor, cannot be sustained, and must be dismissed with costs; and that the motion, so far as it seeks to discharge the order for taxing Mr. *Wilton's* bill of costs, cannot be granted without the consent of Mr. *Wilton*."

The expressions of the Court in *Wilton* v. *Chambers*, that "Mr. *Wilton* was incapable of practising," and that "he was off the roll of attornies," must be considered as said merely in respect of the case before them; they cannot have meant that he was off the roll to all intents and purposes. There are other cases to show that the words "null and void," in the statute, must be taken with some qualification. In *Hodkinson* v. *Mayor* (*k*), an attorney, who had neglected to obtain his certificate, in pursuance of 37 *Geo.* 3, was held not liable to the penalty imposed by 12 *Geo.* 2, c. 13, s. 7. for practising in the County Court. That case was decided upon the authority of *In re Hodgson* and *Ross* (*l*), where it was held that the omission by an attorney to take out his certificate did not render him "an unqualified person" within the 22 *Geo.* 2, c. 46, s. 11, so as to subject his agent to the penalties of that Act for permitting him to practise in his name. In *Hilleary* v. *Hungate* (*m*), *Littledale*, J., said, though he considered himself bound by the decision of this Court, in *Ex parte Nicholas*, that he felt inclined to think the decision in *Ex parte Jones* was the correct one. Assuming it to be so, it certainly

(*j*) 2 D. P. C. 451.
(*jj*) 6 Taunt. 408, 2 Marsh. 123.
(*k*) 1 Will. Woll. & Dav. 15; 6 A. E. 194; 1 N. & P. 397.
(*l*) 1 Har. & Wol. 265; 3 A. & E. 224, S. C. (nom. *In re R. & H.*); 4 N. & M. 763.
(*m*) 3 D. P. C. 56.

appears inconsistent that an attorney, who has been admitted, and has omitted to take out his certificate, for more than a year, may do so when he pleases, without re-admission; but that if upon his re-admission he makes a similar omission, the re-admission is to be held wholly void. In the present case Mr. *Wilton* would hardly have been admitted to the bar, after his re-admission in 1823, unless he had applied to have his name taken off the roll, even though he had not taken out his certificate. The rules of practice as to admission of attornies are always considered as open to be relaxed, according to the hardship of a case; *Exp. Hubbard* (*n*), *Exp. Blunt* (*o*). [*Tindal*, C. J.—This can hardly be called a question of mere practice. The other side contend that, by the decision of the *Queen's Bench*, Mr. *Wilton* at the time of his admission here, was not an attorney of that Court, within the terms of the Act of Parliament.] He was *de facto* admitted an attorney of the *King's Bench* at the time of his admission here, and the Court are not called on to say that he was on the roll of the *King's Bench* at that time. The hardship will certainly be extreme, if, after a lapse of thirteen years, this Court should hold that his admission here, obtained without fraud, was wholly void, thereby exposing him to penalties during the whole of that period; *Slack* v. *Wilkins* (*p*). After such a lapse of time, the Court might consider the roll conclusive, and not inquire into irregularities previous to the admission; *Exp. Page* (*q*); *Anon.* (*r*).

Wilde, Serjt., in support of the rule.—The effect of the decision in *Wilton* v. *Chambers* is, that Mr. *Wilton* was not an attorney of the Court of *King's Bench* at the time of his admission here, and the principle of that case also establishes that he was never an attorney of that Court, not having taken out his certificate within a year of his first admission. As he was admitted in this Court upon the ground that he was an attorney of the *King's Bench*, on its appearing that that ground fails, it follows that he has never been properly admitted here. He was not in fact in a situation to be admitted here. The statute of 37 *Geo.* 3 is a Revenue Act to a certain extent only; but it is directed also to many very important subjects with reference to the admission of attorneys. It is extremely necessary to know the pursuits of an attorney during the time he has omitted to take out his certificate. The term "culpable

(*n*) 1 D. P. C. 438.

(*o*) 5 D. P. C. 231. See also *Exp. Matthews*, 1 B. & Ad. 160; *Exp. Frost*, 1 Har. & Wol. 111, 3 D. P. C. 322; *Exp. Vaughan*, Will. Woll. & Dav. 46; *Exp. Black*, Id. 73; *Exp. Peterson*, Id. 196; *Exp. Lovegrove*, Id. 347; *Exp. Busk*, Id. 348; *Exp. Cooper*, Ibid. 5 D. P. C. 703; *Exp. Holland*, Will. Woll. & Dav. 349; 5 D. P. C. 681; *Exp. Tomkins*, Will. Woll. & Dav. 569; 6 D. P. C. 3; *Exp. Collins*, 1 Will. Woll. & Hodg. 173; 6 D. P. C. 495; *Exp. Johnson*, 1 Will. Woll. and Hodg. 404.

In *Exp. Smith*, (*C. P., E. T.*, 1839, *April*, 15th), which was an application by an attorney to be re-admitted, it appeared that the applicant had been struck off the roll at his own request, in the preceding Term, that his father, who had been an attorney, had since died, and that he was desirous of returning to the profession to continue the suits that were left in his father's office; the requisite notices had only been given on the 12th *April*, and the rule *H. T.* 6 *W.* 4, requiring the affidavit to be filed with a master, had not been complied with. The Court, under the peculiar circumstances of the case, allowed the affidavit to be then filed, and a rule to be drawn up for the party's re-admission on the last day of the Term (8th *May*), but intimated that the case must not be drawn into a precedent.

(*p*) 1 C. & M. 23; 3 Tyr. 158.

(*q*) 1 Bing. 160; 7 Moo. 572.

(*r*) 2 B. & Ad. 766.

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neglect," used in *Exp. Matson* means *intentional*, as opposed to *accidental* neglect. In this case there has been a voluntarily cessation of practice from 1823 to 1826. *Exp. Nicholas* shows that Mr. *Wilton* ought to have applied for re-admission in the *King's Bench* in 1826. If he had made such application, it would have been necessary for him to explain how he had occupied himself since 1823. If he applied for an original admission here, he must have given the regular notices, &c.; but by making the application as an attorney of another Court, all these inquiries were precluded. He virtually affects to be a practising attorney of the *King's Bench*, at the time he applies for admission here, when in fact he was not so; and consistently with the bare statement that he had been re-admitted an attorney of the *King's Bench*, he might have been subsequently struck off the rolls of that Court before his application here. The question before the *Master of the Rolls* was of a wholly different nature from the present.

Cur. ad. vult.

TINDAL, C. J. now delivered judgment:—

Upon this rule, which calls on Mr. *Henry Wilton* to show cause why his name should not be struck off the roll of attorneys of this Court, the facts upon which the Court is called upon to determine, are these:—

Mr. *Wilton* was admitted an attorney of the Court of *King's Bench* in 1810, and took out his first certificate as an attorney in 1813, continuing his certificate yearly, till 1819 inclusive, when his last certificate was in force until the 15th *November*, 1820; from that time he ceased to take out his certificate, or to practice, till 1826.

In the year 1823 he was re-admitted an attorney of the Court of *King's Bench*, upon an affidavit stating his original admission, and that in pursuance of the statute, and previous to his practising, he took out a certificate, which he continued to take out, and duly to pay for the same, until the 15th *November*, 1820; but from that day he omitted so to do, and ceased to practise. But after such re-admission, no certificate was taken out by him until 1826.

Upon this state of facts, on the 25th *June*, 1837, a rule *nisi* was obtained in the Court of *Queen's Bench*, in the case of *Wilton* v. *Chambers*, calling on the plaintiff to show cause why certain judgments, executions, and other securities, should not be set aside; which rule was afterwards made absolute in *Michaelmas* Term, 1837; the rule reciting that *Wilton* was not entitled to practise in the Court of *Queen's Bench*, and that the question as to the judgments, &c., should be referred to the Master, on certain terms therein contained. From the judgment of the Court it appears that the ground on which the Court proceeded to make the rule absolute was, that on re-admission, an attorney is bound to take out his certificate forthwith; and that Mr. *Wilton* not having so done till 1826, his re-admission in 1823 was null and void, under the thirty-first section of the stat. 37 *Geo.* 3, c. 90; or in other words, that in 1826 he was off the roll of attorneys of that Court.

Such being the statement relating to Mr. *Wilton* as an attorney of the Court of *Queen's Bench*, it appears that in *Hilary* Term, 1826, he was admitted for the first time an attorney of the Court of *Common Pleas*, upon an affidavit that he was then an attorney of the Court of *King's Bench*, and upon producing to the officer the admission of 1810, in the Court of *King's Bench*,

and reading his affidavit, that he had paid the duty on the articles, and that he had been admitted an attorney of the Court of *King's Bench*.

Nothing can be more express or positive than the affidavit of Mr. *Wilton*, as to the exclusion of any possibility of fraud on his part in obtaining his admission in this Court. In *Hilary* Term, 1826, he applied at the Secondaries' office to ascertain what was requisite and necessary in order to be admitted an attorney of this Court. He stated to the Secondary the exact facts of his case as to his admission and re-admission in the Court of *King's Bench*, and that he had taken out his first certificate under such re-admission in *January*, 1826, and asked the officer especially, if it was necessary for him to give the usual notices, as he had done on his re-admission, when the Secondary told him he need not do so, but that all that was necessary was to make such affidavit, as in fact he had made; and even before he swore the affidavit, he showed it to the Secondary, who stated it was sufficient. And the officer has certified to the Court, during the progress of the argument, that the affidavit was in the precise form then used, and upon which very large numbers of attorneys have been admitted in this Court, although since that time the form has been altered by the insertion of the statement that the party has *continued* an attorney of the Court of *King's Bench* ever since his admission or re-admission.

Upon this affidavit Mr. *Wilton* was admitted; and from the year 1826 he took out his certificate regularly to 1831, when he ceased to practise altogether.

Now, it may be questionable whether he was regularly admitted, or more properly, whether he was entitled to claim to be admitted in the *Common Pleas*, upon filing the affidavit which he produced; for if the defect in it had been pointed out at the time, the Court would probably have required an original admission in this Court.

But he was admitted, *de facto*, without any fraud, and with the knowledge of the Secondary, whom, as before stated, he consulted on the steps to be taken. He had never practised in the *Common Pleas* before that admission. He had never been guilty of any neglect in taking out his certificate after his original admission in this Court. The objection therefore which was made, and held to be available against the validity of his re-admission in the Court of *King's Bench, viz.*, that he had not forthwith taken out his certificate, and that therefore, under 37 *Geo.* 3, c. 90, s. 31, his admission was null and void, cannot apply to his admission in the *Common Pleas* in 1826, for the certificate was forthwith taken out after such admission, and regularly continued. If Mr. *Wilton*, instead of resting upon his admission in the Court of *King's Bench*, had given the regular notices, and obtained his admission as an original admission as an attorney in this Court, all would have been, not only valid in law, but strictly regular and free from objection.

The question, therefore, becomes this—whether this Court is bound to strike Mr. *Wilton's* name off the roll, on the ground, not that his admission is absolutely void, but that, as the facts now appear, it may have been irregularly obtained. And we think, under the circumstances above referred to, and particularly observing the great distance of time at which the objection is made, that we are not called upon, in the exercise of a sound discretion, to direct his name to be struck off.

The rule, therefore, must be discharged; but, as it appears to us, that if the Court had known, at the time of his admission in 1826, that his admission

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in the Court of *King's Bench* was invalid on the ground of the omission to take out his certificate, they would not have allowed him to be admitted in this Court on such an affidavit, we think it should be discharged without costs.

Rule discharged.

May 23.

TOPLIS and another *v.* GRANE.

The defendant, an attorney and member of a firm, gave a written authority to the plaintiffs (brokers), "*or their agent*, to distrain the *several* goods on the premises" of *A.* (an auctioneer), for rent due to *O.*, and verbally directed them to make the distress *forthwith, as there was a large quantity of furniture in the auction-room.* The plaintiffs' clerk struck out their name from the authority, and substituted that of *W.* (another broker), by whom the distress was made, and with whom the defendant had frequent communications.

ASSUMPSIT upon a promise of indemnity.

The first count of the *declaration* stated, that the defendant, at the time of making his promise, &c. carried on the profession or business of an attorney and solicitor; that the defendant, just before the time of the making of his said promise, &c. had represented and affirmed to the plaintiffs that he the defendant was the attorney of one *Frances Osborne*, and that she, the said *F. O.*, was then lawfully entitled to certain arrears of rent, amounting to a certain sum of money, to wit, 210*l.* 15*s.* 6*d.*, due to her at *Christmas*, 1831, from one *William Armstrong*, in respect of the rent of certain premises, being No. 5, *New Bridge-street*, in the parish of *St. Bride's*, *London*, and that the said *F. O.* was then entitled to distrain on the said premises for the recovery thereof; and thereupon, on the 14th *January*, 1832, in consideration thereof, and that the plaintiffs, at the special instance, &c. would, by themselves or their agents, seize and distrain certain goods and chattels on the premises aforesaid, for the recovery of the said arrears of rent so alleged to be due to the said *F. O.* as aforesaid, he the defendant undertook, and then faithfully promised the plaintiffs *to indemnify* and save harmless *the plaintiffs* from all loss, damage, costs and charges which should or might arise or happen to, or be incurred by, them for or by reason of such seizure and distress of the said goods and chattels, or any of them: that the plaintiffs, confiding, &c. did then employ certain persons then carrying on the business of brokers in copartnership, to wit, one *Thomas Warlters*, one *William Warlters*, and one *Samuel Lovejoy*, to make such seizure and distress of the several goods and chattels as aforesaid, as agents of the plaintiffs in that behalf; and the defendant then assented to the employment of such last-mentioned persons by the plaintiffs as aforesaid: that the said agents

The greater part of the goods taken under the distress were privileged, as being the property of third parties, sent to *A.* for sale; the owners brought actions against *W.*, and succeeded; and *W.* sued the plaintiffs, who were compelled to reimburse him. These facts being submitted in a *case* to the Court, to draw such inferences of fact as a jury might:—*Held*,

1. That there was an implied contract on the part of the defendant to indemnify the plaintiffs for acting according to his directions. (*Semble*, that such an indemnity cannot be implied in the case of an *ordinary* warrant of distress.)

2. That the defendant had assented to the employment of *W.* as the plaintiff's agent.

3. That, under the circumstances, it was not the duty of the plaintiffs to ascertain that the goods were not privileged from distress, and therefore that the defendant could not set up negligence as an answer to the action.

4. That the plaintiffs were entitled to recover the amount of damages recovered against them by *W.*, together with the costs of defending that action.

5. That the employment of the plaintiffs having been made by the defendant alone, he could not set off a debt due from them to the firm of which he was a member

of the plaintiffs in that behalf did then, on the 16th *January*, in the year last aforesaid, as such agents, seize and distrain the said several goods and chattels then being on the said premises, for the recovery of the said arrears of rent so alleged by the defendant to be due to the said *F. O.* as aforesaid: that, after the said seizure and distress, to wit, on the day and year last aforesaid, divers large quantities of the said goods and chattels so distrained as aforesaid were claimed by divers persons, on the ground that the same goods and chattels respectively were privileged from the said seizure and distress so made on behalf of the said *F. O.*, as aforesaid; of which said claims the defendant had notice, and was then requested by the plaintiffs to permit them to return the same goods and chattels to the said respective claimants, but he the defendant then wholly refused to give them such permission, and then directed the plaintiffs to retain the said goods and chattels, and cause the same to be retained as such distress as aforesaid: that the said several persons who had so claimed the said several goods and chattels on the ground of their being so privileged from distress and seizure as aforesaid, and who were then, at the time of the said distress, in fact entitled to the possession of the same goods and chattels respectively, thereupon impleaded the said *T. W.* and *W. W.*, together with other persons, in divers, to wit, ten different actions at law, for the recovery of damages in respect of the seizure and detention of the several goods and chattels aforesaid, to which they were so respectively entitled as aforesaid, which said respective actions he the defendant did defend or cause to be defended; and such proceedings were thereupon had in the said several actions, that they the said *T. W.* and *W. W.* were afterwards forced and obliged to pay, and did, out of the joint funds of themselves and the said *S. L.*, as such co-partners as aforesaid, pay unto the said several persons, being plaintiffs in the said respective actions, divers sums of money, amounting in the whole to a large sum of money, to wit, 140*l.* for damages in respect of such seizure and distress of and upon their said respective goods and chattels, and in order to compromise the claims and demands of the several persons in respect thereof, and for certain costs of suit of the respective plaintiffs in the said respective actions; and the said *T. W.* and *W. W.* were also forced and obliged to pay, and did, out of the joint funds of themselves and the said *S. L.*, as such co-partners as aforesaid, pay divers other sums of money, amounting in the whole to another large sum of money, to wit, 150*l.*, for costs necessarily incurred by them in respect of the premises respectively, and in and about the keeping and detaining of the said goods and chattels to await the result of the said actions; and the said *T. W.* and *W. W.*, and *S. L.*, then demanded payment from the plaintiffs of the said several last-mentioned sums of money; and although the said respective goods and chattels so claimed as being privileged from distress, and seized aforesaid, were, at the time of such distress and seizure, in fact so privileged; whereof the defendant had due notice; and although afterwards, on the 25th *January*, 1835, they the plaintiffs gave notice to the defendant of the demand of payment so made upon them, by the said *T. W.*, *W. W.*, and *S. L.* as aforesaid, and then requested the defendant to indemnify and save harmless the plaintiffs from and against the same payment, and all damages in respect of the premises: nevertheless the defendant, not regarding his said promise and undertaking, but contriving, &c. did not, nor would, when he

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was so requested, or at any other time, indemnify and save harmless the plaintiffs from such payment to the said *T. W.*, *W. W.*, and *S. L.*, of the said last-mentioned sums of money, or any part thereof, or of all damages in respect thereof, but wholly neglected and refused so to do; by means whereof they the said *T. W.*, *W. W.*, and *S. L.*, for recovering damages on occasion of the premises, afterwards impleaded the plaintiffs in a certain action in Her Majesty's Court of *Exchequer*; and such proceedings were thereupon had in the said last-mentioned court, that the said *T. W.*, *W. W.*, and *S. L.* afterwards, by the consideration and judgment of the said last-mentioned Court, recovered against the plaintiffs a large sum of money on occasion of the premises, and of their costs by them about their suit in that behalf expended, to wit, 164*l.* 9*s.* which last-mentioned sum of money they the plaintiffs afterwards, to wit, on the 25th *May* 1835, were forced and obliged to pay, and and did then pay to the said *T. W.*, *W. W.*, and *S. L.*; and the plaintiffs were also forced and obliged to lay out and expend, and did lay out and expend, a large sum of money, to wit, 50*l.*, in and about their defence in the said last-mentioned action: from which several sums of money so paid by the plaintiffs as aforesaid, he the defendant had not indemnified or saved harmless the plaintiffs, although often requested so to do, but had therein wholly failed and made default, contrary to the form and effect of the said promise and undertaking of the defendant so by him made as aforesaid; and although the plaintiffs had been put to and had incurred divers other costs and charges, amounting to a large sum, to wit, the sum of 100*l.*, on occasion of the premises; and although afterwards, on the 4th *June*, 1835, they the plaintiffs required the defendant to indemnify them from the said costs, charges, and expenses, yet the defendant, not regarding his said promise, had not indemnified the plaintiffs as last aforesaid, nor paid to them the said monies, or any of them, as aforesaid, &c.

The declaration also contained *indebitatus* counts (each claiming 200*l.*) for work and labour and materials, for money paid, and on an account stated.

Pleas; First (to the whole declaration), *non assumpsit.*

Second (to the first count). As to so much of the causes of action as related to the employment of the said *T. W.*, *W. W.*, and *S. L.* by the plaintiffs; that the defendant did not assent to the employment by the plaintiffs of the said *T. W.*, *W. W.*, and *S. L.* to make such seizure and distress, *modo et formâ.*

Third (to the same), as to so much of the causes of action as related to the defendant having directed the plaintiffs to retain the said goods and chattels, and cause the same to be retained; that the defendant did not direct the plaintiffs to retain the said goods and chattels, and cause the same to be retained, *modo et formâ.*

(Issue was joined upon these pleas.)

Fourth, (to the same) as to the causes of action in the introductory part of the *third plea* mentioned; that true it was that he the defendant did direct the plaintiffs to retain the said goods and chattels in the first count mentioned, and to cause the same to be retained as such distress, as in that count mentioned; but that afterwards, and within a reasonable time after such direction given by the defendant, and before the sale of the said goods, and before any expenses were incurred in respect of the same, to wit, on the 28th *January*, 1832, he the defendant wholly recalled and *revoked* the said direction, and then ex-

pressly left it to the plaintiffs to exercise their own discretion to sell the said goods and chattels so seized as aforesaid or not:—*verification.*

Replication—Traverse; and issue.

Fifth plea (to the same), as to so much of the causes of action as related to the defendant having defended, or caused to be defended, the said actions in the first count said to have been brought by the several persons who claimed the said goods and chattels against the said *T. W.* and *W. W.*, together with other persons, that the said actions in the first count mentioned to have been brought by the several persons who had claimed the said goods and chattels against the said *T. W.* and *W. W.*, together with other persons, were brought against the said *T. W.* and *W. W.*, the now defendant, the said *F. O.*, one *Jonathan Osborne*, and one *W. Malyon*, the said four last-mentioned persons being the said other persons in the said first count mentioned; and the said *J. O.* and *W. M.* having been employed by and on behalf of the plaintiffs in the making of the said distress; that, at the time of the bringing of the said actions, he the defendant was an attorney of the Court of *Exchequer*, and a partner with *J. S. Brooks* and *T. Cooper*, attorneys at law, and carrying on business in co-partnership with them as such attorneys, under the stile and firm of *Brooks, Grane & Cooper*, and that the said actions were defended, and caused to be defended, by the now defendant, and the said *J. S. B.* and *T. C.*, for and on account of the said *F. O.*, as the attorneys of and for the said *F. O.*, and on her retainer, and for and on account of the now defendant, and for his necessary protection in that behalf, he the defendant so being a partner in the said firm of *Brooks, Grane & Cooper* as aforesaid, and for and on account of the said *T. W.* and *W. W.*, *J. O.* and *W. M.*, as the attorneys of and for the now plaintiffs, and upon their retainer by them in that behalf given to the defendant and the said *J. S. B.* and *T. C.*; and that he, the defendant, did defend, and cause to be defended, the said last-mentioned actions, in manner and form as in that plea mentioned, but not further or otherwise.

Replication—traversing that the actions were defended by the defendant and *J. S. B.* and *T. C.*, on account of *F. O.*, as the attorneys for the said *F. O.*, and on her retainer, and on account of the defendant, and for his necessary protection in that behalf, and on account of *T. W.*, *W. W.*, *J. O.*, and *W M.*, as the attorneys for the plaintiffs, and upon their retainer.—Issue thereon.

Sixth plea (to the breach in the first count), that the said *T. W.* and *W. W.* were not forced and obliged to pay, and did not pay, unto the said several persons being plaintiffs in the said respective actions in the first count mentioned, any sums of money whatsoever for damages in respect of such seizure and distress as in the first count mentioned, or in order to compromise the claims and demands of the said several persons in respect thereof, or for costs of suit of the respective plaintiffs in the said respective actions; nor were the said *T. W.*, *W. W.*, and *S. L.* forced or obliged to pay, nor did they pay any moneys for costs necessarily incurred by them in respect of the said actions, or in or about the keeping and retaining of the said goods and chattels; nor were the plaintiffs forced or obliged to, nor did they lay out or expend any moneys whatsoever in or about their defence in the action brought against them by the said *T. W.*, *W. W.*, and *S. L.*—Issue thereon.

Seventh plea (to the breach in the first count lastly assigned)—that the plaintiffs were not put to, nor did they incur, any costs and charges, *modo et formâ*—issue thereon.

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that count mentioned, by and through the negligence, misconduct and default of the plaintiffs and their servants, and by and through the want of skill, care and attention of the plaintiffs and of their servants, and not further or otherwise.

Replication—Traverse; and issue.

Ninth plea (to the second and subsequent counts), that the promises in those counts mentioned were made by the defendant and the said *J. S. B.* and and *T. C.* jointly, and not by the defendant alone; and a set off due from the plaintiffs to the defendant and *J. S. B.* and *T. W.* for work and materials, money paid, and on an account stated.

Replication—traversing that the said promises were made by the defendant, and *J. S. B.* and *T. W.* jointly; and that the plaintiffs were indebted to the defendant, and *J. S. B.* and *T. W.*, *modo et formâ*.—Issue thereon.

Tenth plea (to the second and subsequent counts)—a set off due from the plaintiffs to the defendant alone, for considerations moving from the defendant, and similar to those mentioned in the ninth plea.

Replication—traversing the alleged set off.—Issue thereon.

Eleventh plea (to the second and third counts), that the work therein mentioned was done by the plaintiffs upon the retainer of the defendant, for the purpose of distraining for certain arrears of rent in and upon certain premises, and that the materials therein also mentioned were provided by the plaintiffs in and about the same; and that the money in the third count mentioned was paid and disbursed by the plaintiffs in and about the said retainer, and for the purpose aforesaid; and that the said work was done and performed by the plaintiffs so unnecessarily, and in so negligent, unskilful and improper a manner, that, by and through the default, negligence, and want of skill, care and attention of the plaintiffs in that behalf, the said work, and the materials for the same provided, and the said disbursements so made as aforesaid, became and were wholly useless, and of no value whatsoever to the defendant, whereof the plaintiffs at the time in the said second and third counts mentioned had notice.

Replication—that the work was done unnecessarily, &c., and became wholly useless, &c.—Issue thereon.

The action was brought to recover 185*l.* 9*s.* 6*d.* under the following circumstances:—The plaintiffs were partners, as auctioneers and valuers, under the firm of *Toplis* and *Son*. The defendant is an attorney, and, from a period anterior to *Christmas* 1831, until the 24th *June* 1832, carried on business as such in partnership with Messrs. *Brooks* and *Cooper*, under the firm of *Brooks*, *Grane* and *Cooper*. Since the last-mentioned day he has carried on business alone.

At *Christmas* 1831, 210*l.* 15*s.* 6*d.* became due from Mr. *W. Armstrong* to Mrs. *Frances Osborne*, the aunt of the defendant, for rent of the premises. No. 5, *New Bridge-street*, *Blackfriars*. *Armstrong* was an auctioneer, and the lower part of the premises was used by him for the purpose of an auction-room. On the afternoon of *Saturday*, the 14th *January*, 1832, the defendant called at the plaintiff's office, and gave to one *Brown*, their clerk, the following authority to distrain for the above-mentioned rent:—

"Messrs *Toplis, or their agent*.—I do hereby authorize you, *or your agent*,

New Bridge-street, in the parish of *St. Bride*, in the city of *London*, for the sum of 210*l.* 15*s.* 6*d.*, for arrears of rent due from *William Armstrong* to *Frances Osborne*, at *Christmas* last, and for so doing this shall be a sufficient authority. As witness my hand this 14th day of *January*, 1832.

(signed) *William Grane.*"

The defendant desired *Brown* to get the distress levied *forthwith, as there was a large quantity of furniture in the auction-room.* On the defendant being informed that both the defendants were absent, he said, that unless he could get the distress levied at once, he must take it elsewhere to be done; whereupon *Brown* told him, that as soon as any one came in it should be done.

Brown altered the warrant, by erasing the name of *Toplis*, and substituting that of *Warlters*, and introducing after the words "or their agent," the name of "*Joshua Gray.*" *Brown* took the warrant so altered to Messrs. *Warlters*, with directions to execute the same forthwith; and early on *Monday*, the 16th, Messrs. *Warlters*, by their clerk, the said *Joshua Gray*, distrained all the goods on the premises, leaving a man, *Jonathan Osborne*, to whom was added, on the following day, *William Malyon*, in possession. On the 18th, Messrs. *Toplis* and *Son* gave the defendant notice that the distress had been levied.

On the 19th, Messrs. *Warlters* and Co. were served with notices (directed to them, and to the defendant, and to *Frances Osborne*), of claims to some of the goods by ten different persons, as being their property; whereupon Messrs. *Warlters* and Co. handed over the notices to the plaintiffs, who immediately sent them to the defendant.

On the same day the plaintiffs sent *Brown*, their clerk, to the defendant, to request that he would give them further directions, and *an express indemnity*, before they proceeded further with the distress. The defendant thereupon wrote to the plaintiffs the following:—

"20th *January*, 1832.

"We hereby undertake, on the part of Mrs. *Osborne*, to indemnify you for proceeding to sell the goods distrained on the premises, No. 5, *New Bridge-street.*

"*Brook, Grane* and *Cooper.*"

The plaintiffs forwarded the above to Messrs. *Warlters*, adding thereto—"We hereby undertake to indemnify you in the above matter."

On the 21st *January* the goods distrained were condemned, and some of them were removed from *Armstrong's* premises to Messrs. *Warlters'* warerooms, in *Farringdon-street*, preparatory to a sale, of which removal the defendant had notice. On the 23d, a clerk of Messrs. *Warlters* called on the defendant, and stated, that the attorney of the claimants had called upon them, and said he had a note from the defendant to give up the goods; when the defendant said, that Messrs. *Warlters were to go on with their instructions till the same were contradicted.* On the 24th the defendant called upon the plaintiffs, and told them they were to go on with the distress, and that he would give them *a further guarantee.* On the 25th the defendant called upon Messrs. *Warlters*, and said he would write to them that evening or the following morning, and that the goods were not to be removed till then. The goods so removed were advertised for sale on the 27th *January.*

On the 28th *January* the defendant wrote the plaintiffs the following letter:—

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would be willingly subscribed by yourself and friends to defend the actions brought by Mr. *Mott* and his employer, I have not settled those actions, as I had before proposed to do; and the plaintiff's attorney now refuses to settle them. I regret I have not seen or heard from you on the subject since *Thursday*. As the goods are not sold, *I must request you to consider my letter* to you of the 20th instant, *containing an undertaking on the part of* Mrs. Osborne *to indemnify you* for selling them, *as revoked*. I must leave you to exercise your own discretion as to selling them or not; but if you wish for any other indemnity or guarantee, I will with pleasure apply to Mrs. *Osborne* for her sanction.

"(Signed) *W. Grane*,
"For *Brooks, Self* and Co."

On the 31st the defendant again wrote to the plaintiffs as follows:—

"Counsel advised that I should appear for Mrs. *Osborne* and myself alone, as I have not received from Mr. *Warlters* authority to appear for himself and the three others. This, therefore, I have directed to be done; and they must take any consequences resulting from their not giving me the necessary authority to appear for them. Counsel also thinks, that it is more hazardous not to sell than to sell, because the surplus (if any) should be ascertained and returned as speedily as possible, in the usual way; and, if not, he thinks they may have a fresh ground of action. At the same time I must leave it to yourselves and Mr. *Warlters* to act as you may think proper in this respect, as counsel is of opinion, that Mrs. *Osborne* ought not to give any indemnity for the discharge of duties as to which not the least doubt was raised till after the goods had been taken."

Ultimately, at the request of the present plaintiffs, Messrs. *Brooks, Grane* and *Cooper*, entered appearances for all the defendants in the several actions. The sale was again advertised to take place on the 7th *February*. On the 6th Messrs. *Warlters* offered to pay the costs and settle the actions, provided the defendant would consent to the goods being returned; and the defendant was applied to for an indemnity. On the following day he addressed a letter, in the name of his firm, to the plaintiffs, declining to give any indemnity, and concluding thus:—

"In the mean time, we must leave it to your own discretion to proceed with the sale of the goods seized, or not; but, as Mrs. *Osborne's* solicitors, we wish the sale to take place when by law it ought."

On the 29th *February*, the defendant wrote to the plaintiffs as follows:—

"Counsel has again advised us that the goods ought to be sold, or the defendants may be prejudiced at the trial. You will, of course, exercise your own discretion in this respect: but Mrs. *Osborne* must not be prejudiced; she looks to you for compensation for any injury she may sustain by reason of the goods not being sold in due time."

Again, on the 17th *April*:—

"We presume that these goods have been sold, pursuant to our directions and to the advice of counsel. If not, we beg to know why they have not, and in whose possession they now are, in order that we may immediately consult with counsel as to the proper course to be taken by Mrs. *Osborne*."

The case then set forth a lengthy correspondence between the parties, and s

before alluded to was tried, and a verdict entered for the plaintiff (*a*); and that thereupon the other nine were settled, the costs being paid, and the goods restored. The costs, which amounted to 222*l.* 15*s.* 10*d.* were paid by *Warlters*.

Warlters and Co. afterwards sued the plaintiffs for the expenses incident to the distress, and the costs consequent thereon, and recovered against them 164*l.* 9*s.*, which, with 21*l.* 0*s.* 6*d.* the costs of defending that action, amounted to 185*l.* 9*s.* 6*d.*, the sum sought to be recovered in this action.

The Court was to be at liberty to draw any inferences of fact which a jury under the circumstances, might have drawn; and the parties agreed to be concluded by the finding of the Court upon the whole matter: and the question for the opinion of the Court was, whether, under the circumstances, the defendant was liable or not; and, if he was, to what amount: the verdict and judgment to be entered accordingly.

The case was argued at the sittings in *Banc*, after last *Hilary* Term, by *Wightman* for the plaintiffs, and *W. B. Watson* for the defendant (*b*).

The following cases and authorities were cited: Com. Dig. *tit.* Action upon the Case upon *assumpsit* (F. 6), *Payne* v. *Wilson* (*c*), *Adamson* v. *Jarvis* (*d*), *Merryweather* v. *Nixan* (*e*), *Humphreys* v. *Pratt* (*f*), *Betts* v. *Gibbins* (*g*), *Farebrother* v. *Ansley* (*h*), *Wilson* v. *Milner* (*i*), *Robins* v. *Bridge* (*j*), *Hartop* v. *Juckes* (*k*), *Burrell* v. *Jones* (*l*), *Burslem* v. *Fern* (*m*), *Housin* v. *Barrow* (*n*), Bac. Abr. *tit.* Authority (D.); *Shackell* v. *Rosier* (*o*), and *Fletcher* v. *Harcourt* (*p*).

TINDAL, C. J. now delivered judgment:—

The declaration in this case consisted of a special count upon a promise of indemnity, alleged to have been made by the defendant to the plaintiffs, and of the common *indebitatus* counts, for work and labour, for money paid, and for money due upon an account stated. To the whole of which declaration the defendant pleaded *non assumpsit*, and to different parts of the declaration ten other pleas. As it will be necessary to consider separately the issue raised upon each of these pleas, it will be most convenient to take them in their order, and to apply the facts found in the special case separately to each plea.

The special count states, that, "in consideration that the plaintiffs, at the

(*a*) See *Adams* v. *Grane*, 1 C. & M. 380; 3 Tyr. 326.

(*b*) The points raised in the argument will be found to be sufficiently stated in the judgment.

(*c*) 7 B. & C. 423; 1 M. & R. 708.

(*d*) 4 Bing. 66; 12 Moo. 241.

(*e*) 8 T. R. 186. It was there held, that if a party recover in *tort* against two defendants, and levy the whole damages on one, he cannot recover a moiety against the other for his contribution. Upon the case being cited at bar, *Tindal*, C. J. observed, that the doctrine contained in it had been much softened off by subsequent cases. See the note to the case, 2 Smith, Lead. Ca. 298, and the note to *Lampleigh* v. *Brathwait* (Hob. 105), Id. vol. I. p. 70, 71.

(*f*) 2 Dow, & Cl. 288.

(*g*) 2 A. & E. 57; 4 N. & M. 64.

(*h*) 1 Camp. 343.

(*i*) 2 Camp. 452.

(*j*) Mur. & Hurls. 257; 3 M. & W. 114; 6 D. P. C. 140.

(*k*) 2 M. & S. 438.

(*l*) 3 B & A. 47.

(*m*) 2 Wils. 47.

(*n*) 6 T. R. 122.

(*o*) 2 Hodg. 17; 2 N. C. 634 3 Scott, 59.

(*p*) Hutton, 55.

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request of the defendant, would, by themselves or their agents, seize and distrain certain goods and chattels on certain premises, for the recovery of certain arrears of rent alleged to be due to *Frances Osborne*, he, the defendant, undertook to indemnify and save harmless the plaintiffs from all loss, damage, costs and charges which should or might arise or happen to, or be incurred by, them, for or by reason of such seizure and distress of the said goods and chattels, or any of them."

The plea of *non assumpsit*, so far as it relates to this special count, puts in issue the promise to indemnify as therein alleged, and, consequently, the first and, indeed, the principal question raised upon the record is, whether the promise to indemnify, as laid in the declaration, is supported or not by the evidence; and we are of opinion, that upon such evidence given at the trial of this action, a jury would have inferred, and would have been justified in inferring, the promise to indemnify as laid in the declaration.

It is quite unnecessary to lay it down as a general rule of law, that the broker who enters under an ordinary warrant of distress, and takes goods upon the premises that are privileged by law from distress, can look for indemnity from his employer. In most cases the broker has a better opportunity of informing himself as to any exemption from the liability to distress which may belong to the goods found upon the premises, than the landlord or his agent can possibly have. The landlord and the agent, indeed, have frequently no opportunity whatever. To hold, therefore, as a general proposition, that the law gives in all cases an indemnity to the broker, would have the effect, in many, of throwing the consequences of his own wrongful act, or want of caution, from himself upon his employer, and would tend to render him generally careless in the discharge of his duty. But we think the facts stated in this special case would satisfy a jury, that the defendant, by his conduct throughout the whole transaction, caused the plaintiffs to believe that they were acting under an indemnity from him, and that such an indemnity, therefore, may be justly inferred to have been given. In the first place, the defendant knew that the premises on which the distress was to be taken were in the occupation of an auctioneer, and that the lower part of the premises was used by him for the purpose of an auction-room. In the next place, by his warrant of distress, he directs the plaintiffs, or their agent, to seize and distrain "the *several* goods and chattels on the premises," words that necessarily import his intention, that no part of the goods found was to be left. In the third place, the defendant desires the distress to be levied *forthwith*, assigning as a reason to the plaintiff's clerk, "that there was a large quantity of furniture in the auction-room" which could not have been understood by the plaintiffs in any other sense than a specific direction to take the furniture there found; the defendant adding, by way of urgency to his direction "that unless the plaintiffs could get the distress levied at once, he must take it elsewhere to be done." And, lastly, the request made by the plaintiffs to the defendant for an *express* indemnity, before they proceeded *further* with the distress, shows they had contemplated acting under an indemnity; and the express indemnity then given, to which the defendant was one of the subscribing parties, *viz.* an indemnity for proceeding to *sell* the goods was calculated still further to assure the plaintiffs, that the defendant originally intended to indemnify them; and, if so, the subsequent withdrawal by the defendant of such indemnity, whether right or wrong, could not have the

effect of discharging him from his original responsibility. Add to this, that on the 24th of *January*, the defendant calls on the plaintiffs, and expressly tells them to go on with the distress, and he will give them a *further* guarantee.

And we think this evidence brings the case before us within the principle laid down by the Court of *Queen's Bench*, in *Betts* v. *Gibbins* (*q*), that where an act has been laid down by the plaintiff, under the express directions of the defendant, which occasions an injury to the rights of third persons; yet if such act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof. We, therefore, think that upon the first issue the verdict must be entered for the plaintiffs.

The *second issue* is, whether the defendant assented to the employment by the plaintiffs of Messrs. *Warlters*, to make the seizure and distress. As to which, the evidence was, that the warrant was originally directed to Messrs. *Toplis, or their agent*, which implied a power to depute their authority to some one. On the 21st of *January* the defendant had notice that the goods had been removed from the premises to the warehouses of *Warlters* and Co., preparatory to a sale. No dissent is expressed on the part of the defendant. On the 23d, a clerk of Messrs. *Warlters* calls on the defendant, and informs him that one of the claimants had demanded the delivery of the goods under a note from him, the defendant, when the defendant answers, that Messrs. *Walters* and Co. were to go on with the defendant's instructions till the same were countermanded. And again, on the 25th, there is a personal communication between the defendant and Messrs. *Warlters* and Co. We think these circumstances furnish abundant evidence for the jury to find this issue in favour of the plaintiffs.

An objection, however, was made, that, in the altered and erased state of the warrant, there was no legal evidence of the appointment of Messrs. *Warlters*. But we think, as the alterations made were capable of proof, if not actually visible in the warrant, the reason and occasion of making them might also be explained to the jury; and that the result of the alteration was, that Messrs. *Warlters* were substituted for Messrs. *Toplis*, the plaintiffs. Notwithstanding this objection, therefore, we think the verdict may stand.

The *third issue* is on the point, whether the defendant directed the plaintiffs to retain the goods, and caused the same to be retained, as alleged in the declaration, for the establishing the affirmative of which issue, we think it is enough to refer to the conversation between the defendant and *Warlters* and Co., on the 23rd *January*, the communication with the plaintiffs on the 24th, and the letter of the 29th *January*, from the defendant to the plaintiffs.

The *fourth issue*, raised by the defendant is, whether he, the defendant, after he had given the plaintiff's directions to retain the goods distrained, did afterwards and within a reasonable time after such direction given, and before the sale of the goods, and before any expenses incurred, wholly recall and revoke the said direction, and expressly leave it to the plaintiffs, to exercise their own discretion to sell or not, the defendant for this purpose apparently relies on his letter of the 28th *January*. But this letter by no means amounts to a revocation of the directions given to retain and sell the goods, but is, in terms, no more than a revocation of Mrs. *Osborne's* indemnity given in the letter of the 20th. It is by no means clear from the terms of that letter that

Common Pleas.

TOPLIS v. GRANE.

the defendant intended to exonerate the plaintiffs, at all events, from liability to Mrs. *Osborne*, in case they determined not to sell; whereas, the revocation, in order to satisfy the terms of the plea, ought to have been a clear and unequivocal discharge from the previous directions to retain. And it appears afterwards, in contradiction of the supposed meaning of this letter, that the defendant, as one of the attorneys of Mrs. *Osborne*, on the 7th *February*, writes to the plaintiffs, that "as her solicitors, they wish the sale to take place, when by law it ought." And again, on the 29th *February*, her attorneys, by letter, give an express notice to the plaintiffs, "that Mrs. *Osborne* looks to them for compensation for any injury she may sustain by reason of the goods not being sold in due time." Under this evidence, we think it impossible for the jury to find that the defendant expressly revoked his direction to retain the goods, and that this issue must be found also in favour of the plaintiffs.

The *fifth issue* appears to us to be altogether immaterial; the plea upon which it arises is pleaded, as to so much of the cause of action in the first count mentioned as relates to the defendant having defended the several actions mentioned in the first count, to have been brought by the several claimants of the goods against Mrs. *Osborne*, the defendant, Messrs. *Warlters* and Co., and their servants; and it alleges that the defendant, as a partner with two other gentlemen, as attorneys, did defend those actions for Mrs. *Osborne*, as her attorneys, and for himself in his own protection, and for Messrs. *Warlters* and Co., and their servants, as the attorneys of the plaintiffs, and by their retainer. Upon which allegation the issue is taken. And it seems to us altogether immaterial to the question of damages sustained by the plaintiffs, by reason of those actions having been defended by them, whether they did or did not retain the attorneys who appeared for them, provided such defence was a necessary consequence of, and covered by, the indemnity of the defendant. Upon this issue, therefore, we think no verdict should be entered on either side, but that the jury should be considered as having been discharged.

The *sixth issue* does in effect raise the question of the amount of damages sustained by the plaintiffs, supposing them entitled to recover. And, upon the means of calculation afforded us by the statements in the case, we think those damages amounted to 185*l.* 9*s.* 6*d.*

The *seventh issue* is substantially the same as the sixth; and both must be found for the plaintiffs.

The *eighth* and *eleventh issues* each depend upon the same consideration. The defence set up in the *eighth plea*, which is pleaded to the first count, is, that the plaintiffs were damnified through the negligence, misconduct and default of themselves and their servants. The defence set up by the *eleventh plea*, which is pleaded to the *indebitatus* counts, is, that the work and labour, &c., of the plaintiffs, became wholly useless to the defendant, through their want of care and skill. Both these issues, therefore, depend on this consideration—was it the duty of the plaintiffs, or their agents, to ascertain that the goods seized were not privileged by law, before they made the seizure? And we think, that although such duty may be cast upon the broker in cases of ordinary distresses for rent, or at all events, the duty of using proper care and diligence in ascertaining that the distress may be safely made, yet in this case the defendant by his conduct dispensed with it, for he knew the circumstances under which the goods were taken to, and left upon, the premises, and

A

DIGEST

OF

CASES REPORTED IN THIS PART,

HILARY AND EASTER TERMS, 1839.

PART I.

WILLMORE, WOLLASTON, AND HODGES, VOL. II. PART I., Q. B.; ARNOLD, VOL. II. PART I., C. P.; HORN & HURLSTONE, VOL. II. PART I., EX.

ACTION.

The plaintiff and defendant had been partners, amongst other things, in the purchase and sale of wool. An account relating to this and other transactions was struck between them, in which the defendant was debited with a certain sum "to loss on wool." The account shewed a general balance of 15*l.* in favour of the plaintiff, against which sum the defendant wrote the words, "due from me to Mr. *Wray*," and signed his name. After this settlement, the defendant proposed that the plaintiff should take out the amount in butcher's meat, which the latter was willing to do:—*Held*, in an action brought to recover the amount of the item respecting the wool, that the defendant was liable, without an express promise to pay. *Held*, also, that the agreement relating to the meat afforded no answer to the action. *Wray* v. *Milestone*, 2 Horn & Hurls. 32.

AFFIDAVIT.

See ATTACHMENT, 2. HABEAS CORPUS, 3, 6, 7. PRACTICE, 6, 7.

On shewing cause against a rule, the Court will not take judicial notice of a judge's order, if it is not verified by affidavit, or the rule is not drawn up on reading it. *Sugars* v. *Concanen*, 2 Horn & Hurls. 5.

AMENDMENT.

1. An agreement under seal, purporting to be made between *A.* (the defendant), *G. M.* and *J. H.*, as trustees under a will, of the one part, and the plaintiff of the other part, was executed by the defendant and plaintiff only: it was declared upon as a deed made between the defendant of the one part and the plaintiff of the other part.—*Held*, that this was such a variance, as the Judge at Nisi Prius, or the Court, had power to amend under 3 & 4 W. 4, c. 42, s. 23. *Boys*

2. The declaration stated that the defendant "agreed to erect a booth or building, and fit up the same before the 28th June, according to certain plans agreed on between him and the plaintiff, for the sum of 20*l.*" This contract not having been proved at the trial, the judge amended the record by substituting the following contract in lieu of the one declared upon: "The defendant agreed to erect seats and tables for 25*l.*" *Held*, on motion for a new trial on the ground of the amendment being improper, that the amendment was right. *Ward* v. *Pearson*, 2 Horn & Hurls. 2.

ARBITRATION.

1. An attachment for non-payment of a sum of money, pursuant to an award, cannot be obtained on the part of a person who is not a party to the submission, to whom the money is directed to be paid. *In the matter of Skeete*, 2 Will. Woll. & Hodges, 49.

2. Where disputes, respecting the several liabilities of the parties as joint-owners of a vessel, are referred to arbitration:—*Semble*, that an award, directing a sum of money to be paid to a person who is not party to the reference, for stores supplied to the vessel, is good. *Id.*

3. If a demand is not made for a sum of money, pursuant to an award, until some months after the day on which it is directed to be paid, an attachment for non-payment may nevertheless be granted. *In re Craik*, 2 Will. Woll. & Hodges, 52.

4. An action for a quarter's rent was brought on 27th June, 1838; the defendant pleaded a set-off of 129*l.*, which, by the terms of an agreement between the parties, was not payable till 1st August. An action of slander was also brought by plaintiff against defendant. Both causes, and all matters in difference, *including the claim under which the set-off was pleaded*, were referred. In November an award was made, finding the quarter's rent for the plaintiff in the first action, and negativing the set-off. The arbitrator

der, and awarded 129*l.* to be paid to the defendant, as a matter in difference:—*Held*, that the arbitrator had not exceeded his authority, and that the defendant's claim to a set-off came within the terms of the order of reference. *Petch* v. *Fountain*, 2 Arnold, 15.

5. A case at Nisi Prius was referred to an arbitrator, but without any power to certify that it was a fit case to be tried at Nisi Prius. He awarded to the plaintiff 10*l.* The master taxed the costs on the lower scale in Reg. Gen., Hil. Vac., 4 W. 4. Subsequently to the award, the plaintiff became a bankrupt, and his attorney, with a view to prove against the estate, and with the assent of the assignees, moved the Court for a rule that the Master should tax the costs on the higher scale. The Court held that as this was the first instance of the kind, the Master ought to use a liberal discretion in taxing the costs; but that in future, attornies ought to take care that arbitrators had the same power as a judge, of certifying that the cause was fit to be tried at Nisi Prius. *Wallen* v. *Smith*, 2 Horn & Hurls. 1.

6. An arbitrator who had power to enlarge the time of making his award, by indorsement on the order of reference, applied to the plaintiff's attorney, and received from him a form of enlargement. In pursuance of this, he wrote on the back of the order, "I direct that a rule of this Court shall be applied for, to enable me to enlarge the time for making my award." No rule of Court in pursuance of this direction was applied for, and all the parties proceeded with the reference. The Court *held* the enlargement sufficient, and refused to set aside the award. *Hallett* v. *Hallett*, 2 Horn. & Hurls. 3.

ARREST.

1. The defendant was arrested by one *S.*, a sheriff's officer, who at the time had a warrant from the late sheriff, but none from the present. There was at the time another writ in the sheriff's office against the defendant, at the suit of another party; and one *N.*, another officer, had the warrant upon this writ in his possession. This warrant was delivered by *N.* to *S.*, and the under-sheriff altered the warrant, by substituting the name of *S.* for that of *N.*, as the officer by whom it was to be executed:—*Held*, that the defendant was not in the lawful custody of *S.*, and that the sheriff having, by the alteration of the warrant, become a party to the illegal act of the officer, the defendant was not liable to be detained upon other writs then in the sheriff's hands. *Pearson* v. *Yewens*, 2 Arnold, 16.

2. *Held*, also, that the defendant did not, by suing out a *habeas corpus* to remove himself into the custody of the warden of the Fleet, admit himself to be in the legal custody of the sheriff. *Id.*

3. *Quære*, whether an arrest under ss. 3 & 4 of Stat. 1 & 2 Vict. c. 110, is irregular, where the copy of the *capias* states that the writ is to be in force for *four* months instead of one. *Sugars* v. *Concanen*, 2 Horn & Hurls. 5.

4. A party wrongfully arrested in the first instance, and afterwards detained upon a legal warrant, is not entitled to be discharged out of custody, unless it appears that the sheriff colluded with the wrong-doer. *Robinson* v. *Yewens*, 1 Horn & Hurls. 38.

ARTICLED CLERK.—*See* ATTORNEY, 1, 2, 3, 4, 6.

ASSUMPSIT.

See COVENANT, 1, 2.

The defendant sold a horse to the plaintiff, with a warranty, for 19*l.*; the plaintiff re-sold him to *J.*, with a similar warranty, for 39*l.* *J.* brought an action against the plaintiff upon his warranty. The plaintiff gave notice thereof to the defendant, who refused to take back the horse; whereupon the plaintiff defended the action brought by *J.* The horse was in fact unsound, and by a reasonable examination, which the plaintiff had an opportunity of making, he might have discovered this before he defended the action: *Held*, that under these circumstances the plaintiff's defence of the action by *J.* was rash and improvident, and that he could not recover from the defendant the costs of such action. *Wrightup* v. *Chamberlain*, 2 Arnold, 28.

ATTACHMENT.

See ARBITRATION, 1, 3. ATTORNEY, 9. HABEAS CORPUS, 6.

1. An attachment against a late sheriff for disobedience to a judge's order, calling on the sheriff to return a writ, instead of the late sheriff, is irregular, and may be set aside, though the sheriff has not applied to set aside the order. *The Queen* v. *The late Sheriff of Cornwall*, 2 Will. Woll. & Hodges, 62.

2. The Court will grant a rule for an attachment for non-payment of a sum of money, pursuant to a rule of Court, though there is not an affidavit of the rule having been shewn to the party, if that has in fact been done, but will direct that the attachment shall lie in the office until such an affidavit is made. *Davis* v. *Skerlock*, 2 Will. Woll. & Hodges, 67.

ATTORNEY.

See ARBITRATION, 5, 6.

1. The Court will not interfere to order a person to be admitted an attorney of the Court without examination, before he has subjected himself to the examination, though perhaps he may be entitled to be so admitted. *Ex parte Marshall*, 2 Will. Woll. & Hodges, 44.

2. A mistake, in the notices for admission as an attorney, in the second Christian name may be amended. *Ex parte Dukes*, 2 Will. Woll. & Hodges, 44.

3. Where a person omitted, from ignorance, to make the entry in the books of the four puisne judges of the Court, previous to his admission as an attorney, the Court allowed him to be admitted on the last day of the Term following that for which he had given notice. *Ex parte Griffin*, 2 Will. Woll. & Hodges, 45.

4. A person who cannot be admitted as an attorney in the Term for which he has given notice, on account of being obliged to leave London by the sudden death of a relative, cannot be admitted the next Term, but may give fresh notices for the following Term. *Ex parte Gwynne*, 2 Will. Woll. & Hodges, 45.

5. A person, who had been off the roll for twenty-nine years, re-admitted as an attorney, it appearing that he had, for the last year and a half, been employed as a managing-clerk to an attorney. *Ex parte Brabant*, 2 Will. Woll. & Hodges, 46.

6. The Court will allow a person to be examined for admission as an attorney, where, from inadvertence, the notice to the secretary of the Law Society has not been given. *Ex parte Smallwood*, 2 Will. Woll. & Hodges, 46.

7. If, after verdict, and pending a rule to enter a nonsuit, the parties themselves settle the action, without the intervention of their attornies, after which the rule is made absolute, the plaintiff's atter-

ney is bound to give up the record. *Baber* v. *Harris*, 2 Will. Woll. & Hodges, 53.

8. A rule to compel him to do so, rightly calls on the attorney to shew cause, and not on the plaintiff. *Id.*

9. If a judge's order directs a plaintiff's attorney to be changed, on payment of costs, and the attorney delivers up the papers before he receives his costs, he cannot have an attachment for the non-payment. *Hendy* v. *Collett*, 2 Will. Woll. and Hodges, 63.

10. The re-admission of an attorney in any of the superior Courts is equivalent to an original admission, so as to entitle him to practise in the other Courts. *Ex parte Martin*, 2 Arnold, 2.

AWARD.—*See* ARBITRATION.

BAIL.—*See* COSTS, 2. PRACTICE, 2.

BANKRUPT.—*See* ARBITRATION, 5. COSTS, 1. MORTGAGE. PLEADING, 5.

BILL OF EXCHANGE.

See PLEADING, 6. STAMP.

1. A maker of a note, payable at a particular place, promised, after it had been dishonoured, to pay it by instalments:—*Held*, that under an issue denying the presentment at a particular place, this promise of the defendant was *primâ facie* evidence of the note having been so presented. *Croxon* v. *Worthen*, 2 Horn & Hurls. 12.

2. *Quære*, whether, under these pleadings, the promise of the defendant was admissible as evidence of a *waiver* of presentment.

3. The declaration on a bill of exchange alleged that the bill was indorsed by the drawer to the defendant, by the defendant to *W.*, and by *W.* to the plaintiffs. The plea stated that the bill was indorsed by the defendant to *J. H.* for his accommodation, and without consideration; that *J. H.* indorsed it to *W.*; that the alleged indorsement by the defendant to *W.* was the said indorsement from the defendant to *J. H.*, and from him to *W.* in the plea mentioned. That the bill became due and was dishonoured; after which the plaintiffs and *J. H.* stated an account in respect of this and other dishonoured bills on which *J. H.* was liable to the plaintiffs, and agreed to take from *B.* renewed bills in lieu of them, and in the mean time not to press any parties for payment of the old bills whilst the new ones were running. The declaration then averred that the substituted bills were accordingly drawn and accepted, and delivered to the plaintiffs without the defendant's knowledge or consent, whereby time was given to the parties in the original bill. At the trial the agreement stated in the plea was substantially proved, but it was also proved that *J. H.* did not indorse the bill to *W.*:—*Held*, that the indorsement by *J. H.* to *W.* was a material averment; for unless *J. H.* were a party to the bill, the agreement between him and the plaintiffs did not discharge the defendant, and therefore the plea was not supported, and the plaintiffs were entitled to the verdict. *Lyon* v. *Holt*, 2 Horn & Hurls. 41.

4. In the case of a bill made payable at a particular place, an averment in a declaration against the drawer or indorser stating presentment generally, seems to be sufficient after verdict. *Id.*

CANADA.—*See* HABEAS CORPUS, 5. 6. 7. 8.

CERTIORARI.

1. Under 5 G. 2, c. 19, s. 2, it is not necessary for a prosecutor to enter into recognizances, previous to obtaining a certiorari, for the removal of an order of Sessions quashing a conviction. *Ex parte Spencer*, 2 Will. Woll. & Hodges, 7.

2. The Court will grant a rule absolute in the first instance, to quash a writ of certiorari removing a cause out of an inferior Court, which had been issued by the party moving to quash it, where no step has been taken by the other party. *Ruffman* v. *Thorowell*, 2 Will. Woll. & Hodges, 51.

3. An action for obstructing a right of way is not an action concerning the freehold or inheritance, or title of land, and, therefore, is prevented being removed out of an inferior Court, by Stat. 21 Jac. 1, c. 23. *Franks* v. *Quinsee*, 2 Will. Woll. & Hodges, 58.

4. On removing such an action, a recognizance must be entered into, under the Stat. 19 Geo. 3, c. 70, though the action is for damages only. *Id.*

5. A recognizance in the alternative, to pay the debt and costs, or render the defendant to prison, is bad. *Id.*

COGNOVIT.—*See* PRACTICE, 16.

CONTRACT.

See AMENDMENT, 2. STOPPAGE IN TRANSITU, 1. 2, 3.

1. If a purchaser is induced, by the false representations of a third party, to enter into an agreement, he may annul the purchase. *Hutchinson* v. *Morley*, 2 Arnold, 2.

2. The plaintiff was employed by the defendants to survey and map the parish of *G.*, on paper to be provided by them. No sum was agreed on by the parties to be paid for the work. The work having been finished, the plaintiff's attorney refused to deliver it, except on payment of 20*l.* 4*s.* 10*d.* He tendered the map and books to the defendants' attorney for inspection, and offered, if the expences were paid, to send them into the country for the inspection of the defendants. He also asked the defendants' attorney to make a tender, which the latter refused to do. The defendants paid 42*l.* into Court, and the plaintiff had a verdict for 73*l.* *Held*, that the plaintiff might maintain an action. That, under this contract, he was not bound to deliver up the map and books before he was paid for his work. That his demanding more than was found by the jury to be due, was no ground of nonsuit, as in such a case the defendants might have tendered the sum due. *Hughes* v. *Lenny*, 2 Horn & Hurls. 13.

3. Where a party furnishes another with materials to do certain work, an action will lie for the price as soon as it is done, and an opportunity is given for ascertaining whether it is done correctly. *Id.*

CONVICTION.—*See* MANDAMUS.

CORPORATION.—*See* POOR, 1, 3.

COSTS.

See ARBITRATION, 5. ATTORNEY, 9. INTERPLEADER. PRACTICE, 4, 16.

1. Where an action was commenced after a fiat in bankruptcy had issued, and the defendant pleaded

certificate, puis darrien continuance, *Held*, that the plaintiff was entitled to discontinue the action, without paying costs, although the proceedings had not been stayed under the 59th section of the Bankrupt Act, 6 Geo. 4, c. 16. *Wollen* v. *Smith*, 2 Will. Woll. & Hodges, 79.

2. In an action upon a bill of exchange, the defendant deposited a sum of money with the sheriff, and 10*l*. for costs, in lieu of a bail-bond, under the 43 G. 3, c. 46, s. 2. A rule obtained by the plaintiff for payment of this money out of Court to him was made absolute. The plaintiff did not enter an appearance for the defendant. A subsequent rule, obtained by the defendant, for allowing the money paid over to the plaintiff, and the further sum of 10*l*. paid into Court by the defendant under the 7 & 8 G. 4, c. 71, s. 1, to be considered in lieu of special bail, was discharged. Both these rules were silent as to costs. A third rule, obtained by the defendant for delivering up the bill to him, *on payment of* the debt and *costs*, was made absolute. *Held*, that the plaintiff was entitled to the costs of the third rule, by the express terms of it, but not to those of the two former rules, as they could not be considered as made in the course of the cause, the plaintiff, by not entering an appearance, having in effect elected to abandon the action. *Hannah* v. *Willis*, 2 Arnold, 7.

2. In an action by a pauper against certain magistrates for turning him out of premises claimed by him, the Court refused to stay proceedings until security was given for costs by a third party, who had instigated the action; inasmuch as it did not appear that the action would not have been brought but for his instigation. *Osborne* v. *Pechell*, *Hearsay* v. *Pechell*, 2 Arnold, 25.

3. Where, in an action for unliquidated damages, the defendant (who had successfully opposed an application to try before the sheriff) consented at the Assizes to withdraw his plea, and confess judgment, for a sum under 20*l*., and costs:—*Held*, that the plaintiff was entitled to costs upon the lower scale only. *Cook* v. *Hunt*, 2 Horn & Hurls. 37.

COVENANT.

1. An action of covenant will lie upon the word "grant" in an indenture of assignment of a lease, if the assignee is disturbed in his possession by being distrained upon for rent in arrear from the assignor, at the time of the assignment. And an action of covenant being maintainable, no action of assumpsit, upon an implied promise to indemnify, will lie. *Baber* v. *Harris*, 2 Will. Woll. & Hodges, 1.

2. *Semble*, that under the circumstances, an action of assumpsit would not lie, even upon an express promise, without a new consideration, such as forbearance. *Id.*

3. By the agreement the defendant covenanted that he and his co-trustees would, within a given time, execute a lease of certain premises to the plaintiff, which should contain certain covenants, and the plaintiff covenanted to accept such lease and execute a counterpart, and pay the expences of making such lease, counterpart and agreement; and for the true performance of the agreement, each of the parties bound himself in the *penalty* of 500*l*., to be recovered against the defaulter as *liquidated damages*.—*Held*, that this sum must be considered as a *penalty*, and not as *liquidated damages*. *Boys* v. *Ancell*, 2 Arnold, 9.

DAMAGES.—*See* ASSUMPSIT. COVENANT, 3.

DISTRESS.—*See* PLEADING, 1.

DISTRINGAS.—*See* PRACTICE, 8, 17.

EASEMENT.—*See* WATERCOURSE.

EJECTMENT.

A tenant in common may be allowed, on entering into the consent rule, in an action of ejectment, to confess lease and entry only, notwithstanding the Stat. 3 & 4 W. 4, c. 27, s. 12. *Doe, dem. Richardson* v. *Roe*, 2 Will. Woll. & Hodges, 47.

ERROR.—*See* PRACTICE, 11, 12.

ESCAPE.—*See* PLEADING, 4.

EVIDENCE.

See POOR, 2.

1. In case against a broker for negligently delivering certain goods without payment, consigned to him to be delivered on payment only, the servant of the plaintiffs is incompetent to prove that the delivery of the goods had been directed by himself, under the orders of the defendant, on the ground that the witness, by his admission, having rendered himself liable to the plaintiffs, was directly interested in fixing the liability upon the defendant by the result of the suit. *Boorman* v. *Brown*, 2 Will. Woll. & Hodges, 8.

2. Where a Court is constituted by Act of Parliament, and possesses a seal, such seal proves itself. The seal of the Court of Insolvent Debtors, when applied under 7 G. 4, c. 57, s. 76, and 1 & 2 Vic. c. 110, s. 105, proves itself. *Doe, dem. Duncan* v. *Edwards*, 2 Will. Woll. & Hodges, 12.

3. A commission to examine witnesses may be issued to examine certain persons named, as well as any other persons who may be found, who can give evidence in the case. *Dimond* v. *Vallance*, 2 Will. Woll. & Hodges, 67.

4. In an action against a surety for the default of his principal in not paying over certain sums received by him, it was proved that the defendant had admitted his liability to pay the account as agreed to between the plaintiff and the principal, and which account had been sent to him, the defendant. This account not being produced at the trial in pursuance of notice, a witness was called, who proved that the account sent to the defendant was the account which had been gone over by the plaintiff and the principal, and which the principal admitted to be correct:—*Held*, that this evidence was properly admitted. *Ward* v. *Sutfield*, 2 Arnold, 4.

GAME.—*See* NOTICE OF ACTION.

HABEAS CORPUS.

1. A writ of habeas corpus is grantable by a single judge in vacation, returnable immediately, and may be made either returnable before the four judges, or before the judge himself who grants it. *The Queen* v. *Batcheldor*, 2 Will. Woll. & Hodges, 19.

2. A return to a writ of habeas corpus *primâ facie* imports verity, and need not, in the first instance, be supported by affidavits. *Id.*

3. *Query*, whether, if a return be shewn on affidavit, or otherwise, to be untrue, any proceedings might be founded thereon for quashing the return. *Id.*

4. A return to an habeas corpus is amendable by the Court after it has been filed. *Id.*

5. To a writ of habeas corpus, sued out by *Wixon* against the gaoler of Liverpool, the return stated, that after the insurrection in Upper Canada was suppressed, the legislature there authorized a pardon, to be granted by the governor, to such persons, charged with high treason, as should, before arraignment, confess their guilt, and petition for a pardon, on such conditions as should seem fit; that *Wixon* was so charged, and so pardoned, on condition of being transported to Van Dieman's Land for fourteen years, to commence on his arrival there; that for want of the means to convey him there directly, he was first taken to Quebec, in Lower Canada, then, under letters-patent of the governor of Lower Canada directed to the captain of a vessel, was embarked to England, and there kept in safe custody in Liverpool gaol, being a secure and convenient place for detaining him while necessary preparations were made for transporting him, in fulfilment of the condition of his pardon. It was contended, that the return was bad for the following objections:—That the prisoner was not convicted. That there was no judgment of transportation. That no authority existed for transporting the prisoner beyond the confines of Upper Canada. That there ought to have been a direct communication of authority from the governor of Upper Canada to each party detaining the prisoner. That the condition of the pardon being for fourteen years, to be reckoned from the arrival of the party at Van Dieman's Land, was void, for uncertainty. That the power to receive the prisoner at Van Dieman's Land ought to have appeared. That the documents, whence the right to imprison was inferred, ought to have been set out. *Held*, that the return was good. *Id.*

6. The return stated, that the letters-patent commanded the captain to receive, &c. the prisoner. It was shewn, upon affidavit, that the name of the prisoner, though it occurred in the recital, was omitted in the mandatory part of the letters. The Court, though they held the letters immaterial to justify the detention, ordered the return to be amended in accordance with the facts, as it was unfit that any falsehood should appear on the records of the Court. The false statement not being wilful, the Court refused to attach the party making the return. *Id.*

7. A writ of habeas corpus, to discharge a party out of custody, ought to be moved for on the affidavit of the party himself, unless it be shewn to the Court that from coercion, or otherwise, he is not in a situation to make such affidavit. *Ex parte Parker*, 2 Horn & Hurls. 45.

8. A return to a writ of habeas corpus, directed to the gaoler of Liverpool, commanding him to bring up the body of a prisoner in his custody, for the purpose of discharging him, stated that by a statute of Upper Canada, it was enacted, that upon petition of any person charged with high treason, committed in that province, preferred to the lieutenant-governor before the arraignment of such prisoner, and praying to be pardoned for his offence, it should be lawful for the lieutenant-governor to grant a pardon to such person in her Majesty's name, upon such terms and conditions as might appear proper; that the prisoner was indicted for the crime of high treason, and before his arraignment petitioned the lieutenant-governor, confessing his guilt, and praying that her Majesty's pardon might be extended to him, upon such conditions as the lieutenant-governor should see fit; that the lieutenant-governor consented that mercy should be extended to the prisoner, on condition of his being transported to Van Diemen's Land for his natural life, to which terms the prisoner assented; that there being no means of transporting him directly from Upper Canada to Van Diemen's Land, it was necessary to take him to Quebec in Lower Canada, that being the most convenient place for the purpose; whereupon, and in order to carry the condition into effect, the prisoner was conveyed, by warrant of the governor of Upper Canada into Lower Canada, and there, by warrant of the governor of Lower Canada, delivered into the custody of the sheriff of Quebec for safe keeping, until he could be transported; that there not being any means of conveying him from Lower Canada directly to Van Diemen's Land, it was necessary to convey him to England; that for the purpose of being conveyed to England, he was delivered by the sheriff of Quebec into the custody of the captain of a vessel; that the captain of the vessel having arrived with the prisoner at Liverpool, and there being no means ready for conveying him immediately to Van Diemen's Land, it was necessary that he should be placed in some safe custody until such means could be provided; that the gaol of Liverpool being the fittest place for that purpose, the captain delivered the prisoner into the custody of the gaoler, who was keeping him in his custody whilst means were preparing for transporting him to Van Diemen's Land:—*Held*, that the prisoner was not entitled to his discharge: on the ground that having confessed himself guilty of treason committed in Canada, he was liable to be tried in England, and therefore every subject of this realm would be justified in detaining him in custody until he should be dealt with according to law. *Id.*

INSOLVENT.

See EVIDENCE, 2.

1. Where an insolvent is indebted in two separate debts to the same creditor, and inserts only one in his schedule, he remains liable to be sued for the other. *Tyers* v. *Stust*, 2 Arnold, 3.

2. The plaintiffs covenanted with the defendant to buy of him a certain business, paying 200*l.*, in the first instance, and a further sum at a future period. The plaintiffs were to be at liberty, at the end of a year and a half, to abandon the purchase; in which case, the defendant was to re-pay them 50*l.*, part of the money advanced. The defendant was afterwards discharged under the Insolvent Act, upon which the plaintiffs, within the time specified, abandoned the purchase, and brought an action to recover the 50*l.* *Held*, that this was not such a debt as could be ascertained at the time of the insolvency, and, therefore, that the defendant was not discharged from it. *Brown* v. *Fleetwood*, 2 Horn & Hurls. 6.

3. A remanded insolvent, before the expiration of his imprisonment, may be detained at the suit of a creditor, without any order of a judge or writ of summons. The 85th section of the 1 & 2 Vict., c. 110, takes his case out of the operation of that Act. *Turner* v. *Darnell*, 2 Horn & Hurls. 35

INTERPLEADER.

The successful party, on the trial of an issue under the Interpleader Act, who applies to the Court to take out money deposited to abide the event of the issue, is entitled to the costs of the application, though he has made no previous application to the opposite party. *Meredith* v. *Rogers*, 2 Will. Woll. & Hodges, 89.

LANDLORD AND TENANT.

1. An upper floor, rented by a tenant from year to year, was accidentally destroyed by fire, and rebuilt

the new premises, they were let by the landlord to another tenant:—*Held*, that as the fire did not determine the tenancy, an action was maintainable for the period between the fire and the re-letting. *Ison* v. *Gorton*, 2 Arnold, 39.

2. Stones which have lain for a long period upon land, and which are lying upon it when it is demised to a tenant, *primâ facie* belong to the owner of the land, and the tenant is not entitled to remove them. *Dearden* v. *Evans*, 2 Horn & Hurls. 7.

LICENCE.—*See* MORTGAGE.

MANDAMUS.

A magistrate having refused to make some convictions at the suit of a friendly informer, to which the party had pleaded guilty, whereby another informer was enabled to prefer other informations, which he could not have done had there been convictions on the first, this Court refused to interpose by mandamus to the magistrate. *Ex parte The British and Foreign Patent Invention Company*, 2 Will. Woll. & Hodges, 57.

MINES.—*See* WATERCOURSE.

MONEY HAD AND RECEIVED.—*See* MORTGAGE.

MORTGAGE.

Certain premises, with the licences attached to them, were mortgaged to the plaintiffs, who afterwards sold the premises, to discharge their mortgage: the licences at this time were suspended. The assignee of the mortgagor, who had become bankrupt, obtained a new licence, which was sold, with the good-will, for a sum of money, to a third party:—*Held*, that this sum was not money received to the use of the plaintiffs. *Query*, whether such licences can be made the subject of a sale. *Manifold* v. *Morris, Assignee of Rigmaiden, a Bankrupt*, 2 Arnold, 19.

NEW TRIAL.

A new trial refused, in an action of slander, where the jury had given only 20*s*. damages. *Rendall* v. *Hayward*, 2 Arnold, 14.

NOTICE OF ACTION.

A gamekeeper, whose deputation was granted and registered under 22 & 23 Ch. 2, c. 25, is not entitled to notice of action, under 1 & 2 W. 4, c. 32, s. 47, for an act claimed to have been done by him under the authority of the latter Statute. *Lidster* v. *Barrow*, 2 Will. Woll. & Hodges, 13.

NOTICE OF TRIAL.—*See* PRACTICE, 8.

ORDER OF SESSIONS.—*See* CERTIORARI, 1.

OUTLAWRY.—*See* PRACTICE, 3.

OVERSEERS.—*See* POOR, 2.

PARTNERS.—*See* ACTION. PUBLIC COMPANY.

PENALTY.—*See* COVENANT.

PLEADING

See WATERCOURSE.

1. Trespass for breaking and entering the plaintiff's house, and taking his goods, on 2d March, 1837. Plea, as to the breaking and entering and taking the the goods, that *J. S.* was tenant to the defendant, and on 25th December, 1836, and at the time when, &c., rent was in arrear; that the said goods, on the 25th February, then being the property and in the possession of *J. S.*, were fraudulently removed from the house demised to him, and with the consent of the plaintiff, placed by *J. S.* in the house of the plaintiff. Justification of the entry and seizure under 11 G. 2, c. 19, s. 1, and verification:—*Held*, on special demurrer, that the plea should have been confined to the breaking and entering; and that the addition, in the introductory part, of the taking the goods, coupled with the justification in the body of the plea, rendered it bad, either as being an argumentative denial that the goods were the goods of the plaintiff, or else as not bringing the case within the Statute. *Fletcher* v. *Marillier*, 2 Will. Woll. & Hodges, 14.

2. That the plea did not admit a simple possession of the goods in the plaintiff, and go on to shew that such possession was wrongful, and that the property was in *J. S.* *Query*, what would have been the effect of a positive averment that the goods were in the possession of the plaintiff. *Id.*

3. If an appearance is not entered by the defendant, according to the form given in the schedule to the Stat. 2 & 3 Will. 4, c. 39, the plaintiff may treat it as a nullity, and enter an appearance for the defendant. *Warren* v. *Love*, 2 Will. Woll. & Hodges, 55.

4. In an action against the marshal for an escape, the plea stated that the prisoner voluntarily returned into custody before the commencement of the action, but did not aver that he returned before the marshal had any notice of his escape:—*Held*, bad. *Davies* v. *Chapman*, 2 Arnold, 23.

5. The bankruptcy of a sole plaintiff, after the cause of action accrued, but before suit, is an issuable plea. *Willis* v. *Allen*, 2 Arnold, 24.

6. To an action against the drawer of a bill of exchange, the defendant pleaded that the bill was drawn, indorsed and accepted in payment of seventeen pockets of hops, sold by the plaintiff to the defendant as answering certain samples: that the defendant had not delivered any pockets of hops answering the said samples, or *any hops whatsoever*, whereby the consideration for the bill had wholly failed. *Replication, de injuriâ.* It appeared that the plaintiff had delivered to the defendant seventeen pockets of hops, but they did not correspond with the samples. The jury found a verdict for the defendant. On a motion to enter a verdict for the plaintiff, the Court refused a rule, on the ground that the averment that no hops had been delivered was an immaterial averment, and that there was a total failure of consideration for the bill. *Wells* v. *Hopkins*, 2 Horn & Hurls. 11.

POOR.

1. Where the revenues of a corporation, consisting of the rents of property, which had always been rated to the relief of the poor previously to the passing of 5 & 6 W. 4, c. 76, were collected by the salaried officers of the corporation, and paid to the account of the borough fund, pursuant to that Statute:—*Held*, that as the 92d sec. directs the borough fund to be

expended in public purposes, the corporate property was not liable to be assessed to the poors' rate. *The Queen* v. *The Mayor, Aldermen and Burgesses of Liverpool*, 2 Will. Woll. & Hodges, 3.

2. In an appeal against an order of removal, one of the overseers of the appellant parish was called to prove the service of the notice of appeal:—*Held*, that he was an incompetent witness. *The Queen* v. *The Recorder of Bath*, 2 Will. Woll. & Hodges, 17.

3. Where the freemen of a borough were entitled to a common of pasture on a large tract of land, with rights to disturb the surface of the earth by digging for clay and gravel, and by cutting down whins, but it appeared that originally there had been rights of common granted, with a right of turbary, on payment of a yearly rent of 2*s*., and that the Duke of Northumberland was still the lord of the soil and royalties of the manor:—*Held*, that the freemen had merely the rights of commoners, and that the corporation of the borough were not liable to be rated to the relief of the poor. *The Queen* v. *The Chamberlains, Common Council and Freemen of the Borough of Alnwick*, 2 Will. Woll. & Hodges, 72.

4. Although the Sessions draw a conclusion from facts proved before them, yet if they afterwards state the facts for the opinion of this Court, the finding of the Sessions is not conclusive, but it will be presumed that the Sessions desire the opinion of the Court. *Id.*

POOR RATE.—*See* POOR, 1, 3.

PRACTICE.

1. The Court will not grant a rule to compute, in an action for calls due on shares in a company, on which interest is also payable. *The Cheltenham and Great Western Union Railway Company* v. *Fry*, 2 Will. Woll. & Hodges, 48.

2. A rule for taking money, which has been deposited in lieu of bail, out of Court, cannot be granted until judgment has been obtained. *De la Bedoliere* v. *Ryan*, 2 Will. Woll. & Hodges, 51.

3. The Court will not grant a distringas to compel an appearance, where it appears that the defendant is abroad, but will grant one for the purpose of proceeding to outlawry. *Grover* v. *Hindmarsh*, 2 Will. Woll. & Hodges, 51.

4. A party is entitled to quash his own scire facias on payment of costs, without assigning any reason for so doing; but the Court will not grant a rule absolute in the first instance for that purpose. *Oliverson* v. *Latour*, 2 Will. Woll. & Hodges, 54.

5. On moving to make absolute a rule nisi to compute, where the rule has been left with a person, who said he had given it to the defendant, it should be sworn that it is believed that what that person said was true. *Swann* v. *Masters*, 2 Will. Woll. & Hodges, 56.

6. The affidavits in support of a rule to set aside proceedings, on account of an irregularity merely in the service of the writ of summons, need not state, as in the case where there has been no service whatever, that no other copy of the writ has come to the defendant's knowledge. *Wintle* v. *Hogg*, 2 Will. Woll. & Hodges, 63.

7. After the judge has certified for speedy execution, under the Stat. 1 Will. 4, c. 7, s. 2, and judgment is signed in vacation, it is still necessary, in this Court, that there should be a rule for judgment, notwithstanding the rule of H. T., 2 W. 4, s. 67. *The Governors of the Poor of Exeter* v. *Sivell*, 2 Will. Woll. & Hodges, 64.

8. If a notice of trial is given too late, the defendant may move to set it aside. *Kirk* v. *Lloyd*, 2 Will. Woll. & Hodges, 71.

9. One of several defendants cannot obtain a rule for judgment as in case of a nonsuit, where the others are not in a situation to join in the motion. *Crowther* v. *Duke*, 2 Arnold, 1.

10. The Court will not postpone the period of shewing cause to a rule nisi for a new trial, in order that an indictment for perjury against a witness may be tried in the mean time. *Hampshire* v. *Harris*, 2 Arnold, 3.

11. The Court cannot, without the consent of parties, order issues in fact to be struck out, with liberty to restore them after the decision of a Court of Error on issues in law. *Carden* v. *The General Cemetery Company*, 2 Arnold, 18.

12. The Court will not postpone the trial of issues in fact, until after the decision of a Court of Error upon issues in law upon the same record. *Beckham* v. *Knight*, 2 Arnold, 18.

13. Where a declaration is filed, it is not necessary to indorse the time for pleading. *Silverside* v. *Tappen*, 2 Arnold, 26.

14. To an action on a promissory note, defendant pleaded that, after the making of the note the plaintiff drew a bill on the defendant, which was accepted by him, and delivered to the plaintiff in satisfaction of the note. The plaintiff replied, denying the making and acceptance and delivery of the bill in satisfaction. A special demurrer for multifariousness *held* not frivolous. *Edwards* v. *Greenwood*, 2 Arnold, 27.

15. In an action brought against the Commissioners of *The Bedford Level*, in respect of the works to be performed upon *The Level*, the venue having been changed, at the instance of the defendants, from N. to C., the Court refused to order it to be brought back, although it appeared that a great portion of the property in C. was liable to be rated to the expences of *The Level*; as it was not shewn that the jury must *necessarily* be composed of parties liable to be so rated. *Thornton* v. *Jenyns*, 2 Arnold, 29.

16. The defendant gave a *cognovit* to recover 72*l*. (the original debt), but judgment was not to be entered up till default of payment of such sum, with costs to be taxed; which debt and costs were to be paid by instalments: a default having been made in the payment of an instalment, the plaintiff signed judgment for the balance of the debt due, without having had the costs taxed:—*Held*, the judgment was regular, but that the costs must be taxed before execution could issue. *Barrett* v. *Partington*, 2 Arnold, 30.

17. An affidavit, in support of a rule to set aside a *distringas*, must follow the description of the parties to the cause, as stated in the writ of summons. *Borthwick* v. *Ravenscroft*, 2 Horn & Hurls. 4.

PRISONER.

See ARREST, 1, 4. HABEAS CORPUS, 5, 6, 7, 8.

A person may, under special circumstances, be discharged under the 48 Geo. 3, c. 123, though no notice has been given of the application to the other party. *Bradley* v. *Webb*, 2 Will. Woll. & Hodges, 47.

PROMISSORY NOTE.—*See* BILL OF EXCHANGE.

PUBLIC COMPANY.

See PRACTICE, 1.

The defendant became a shareholder in a compa

established for the manufacture of beet-root-sugar. The capital was to consist of 250,000*l.*, divided into 10,000 shares of 25*l.* each, but no more than 1,400 shares were ever disposed of. The defendant was not aware that the whole number of the shares had not been sold. An action having been brought against him for the price of certain goods ordered without his knowledge by the secretary of the Company, for the use of the Company:—*Held*, that the defendant, who had not held himself out to the world as a partner, could be charged only on the ground of having authorized the directors to pledge his credit for the goods: that he could not be presumed to have done so in this case, unless the whole proposed capital had been raised; or unless, with a knowledge of its not having been raised, he had authorized the directors to proceed with the speculation. *Pitchford* v. *Davis*, 2 Horn & Hurls. 9.

RECOGNIZANCE.—*See* CERTIORARI, 1, 4, 5.

RULE TO COMPUTE.—*See* PRACTICE, 1.

SCIRE FACIAS.—*See* PRACTICE, 4.

SESSIONS.—*See* POOR, 4.

SHERIFF.—*See* ARREST, 1, 4. ATTACHMENT, 1.

SLANDER.—*See* NEW TRIAL.

STAMP.

An instrument in this form, "*J. M.* Borrowed of *M. A. M.*, his sister, the sum of fourteen pounds, in cash, as per loan, in promise of payment, of which I am truly thankful for, and shall never be forgotten by me, *J. M.*" is a promissory note, and requires a stamp. *Ellis* v. *Mason*, 2 Will. Woll. & Hodges, 70.

STANNARIES COURT.

The Court will grant a rule absolute in the first instance to remove a final decree, on the equity side of the Stannaries Court, into this Court, under the 1 & 2 Vict. c. 110, s. 22, the defendant having removed out of the jurisdiction of the Stannaries Court. *Harvey* v. *Gilbard*, 2 Will. Woll. & Hodges, 48.

STOPPAGE IN TRANSITU.

1. The delivery of goods by the seller to a carrier, by the order of the buyer's agent, for the purpose of being forwarded to the buyer, is not such a constructive delivery to the buyer as to put an end to the seller's right of stoppage *in transitu*. *Jackson* v. *Nichol*, 2 Arnold, 32.

2. Although it seems to be the better opinion that if the buyer actually takes possession of his goods before their arrival at the place of their ultimate destination, the seller's right of stoppage *in transitu* is thereby defeated; yet a mere demand by the buyer, before such arrival, without any delivery, will not have that effect. *Id.*

3. *C.*, the agent of *M.*, bought some lead of the plaintiff at *Newcastle*, which was shipped by *C.*'s order, to be forwarded to *M.* in *London*. Upon the vessel's arrival in the *Thames*, the lead was demanded by *M.*, but the captain refused to deliver it: it was put on board a lighter belonging to the defendants, who were warehousemen: and who had undertaken the delivery of the lead by his orders: while still on board the lighter it was demanded by the plaintiff:—*Held*, that at the time of such demand his right of stoppage still existed. *Id.*

SURVEYOR.—*See* CONTRACT, 2, 3.

TRANSPORTATION.—*See* HABEAS CORPUS, 5, 6, 8.

TREASON.—*See* HABEAS CORPUS, 5, 8.

TRESPASS.—*See* PLEADING, 1, 2.

TRIAL.—*See* PRACTICE, 8, 12.

VENUE.—*See* PRACTICE, 15.

WARRANT OF ATTORNEY.

Rule nisi granted on the 1st of May, for judgment on a warrant of attorney, where the defendant, who was living somewhere in France, was last seen alive on the 20th of February. *Bayley* v. *Western*, 2 Will. Woll. & Hodges, 61.

WARRANTY.—*See* ASSUMPSIT.

WATERCOURSE.

In the year 1705, certain adventurers undertook to continue and extend an under-ground drain, called *Cromford Sough*, for the purpose of unwatering a portion of the mineral field in the wapentake of *Wirksworth*. They secured their remuneration in the shape of ore raised from the mines lying near and benefited by the sough, in consequence of an agreement with the owners of the mines. The mouth of the sough was close to a stream called the *Bonsall Brook*, and discharged into it a constant flow of water. Below the junction of these waters, an ancient corn-mill stood, which was worked by their united power. In 1738, the then proprietors of the sough, through whom the plaintiffs claim a reversionary interest in it, granted it for 999 years to one *S.*, with covenants that he should open, and cleanse and repair it, &c. This lease contained a proviso that no forfeiture for not opening and cleansing, &c., the sough should accrue, provided a new sough were made, which should have the same effect of unwatering the mines. In 1771, the lord of the manor being owner of the land through which the *Cromford Sough* was made, and of a piece of land between the mouth of the sough and *Bonsall Brook*, demised the same to Sir *R. Arkwright*, the father of the plaintiff, together with the stream issuing from the sough. This lease contained a proviso, that if by the bringing up of any other sough, or by any other unforeseen and unavoidable accident, the stream from the *Cromford Sough* should be taken away, or lessened, the lessee should have power to take down the mills, &c., and rebuild them on another site. In 1772, Sir *R. Arkwright* erected extensive cotton-mills on the land in question, and in 1789, purchased that land, and the fee-simple in the mills, together with the manor of *Cromford*, including the land through which the sough was made. The present plaintiffs are now owners in fee of the *Cromford* manor and estates, including the cotton-mills, &c.

A

DIGEST

OF

CASES REPORTED IN PART XII.

HILARY, EASTER, AND TRINITY TERMS, 1839.

WILL., WOLL., AND HODGES, VOL. II. PART 2, Q.B.;
ARNOLD, VOL. II. PART 2, C.P.;
HORN & HURLSTONE, VOL. II. PART 2, EX.

AFFIDAVIT.

Where a rule *nisi* for a nonsuit had been obtained upon an affidavit, in the title of which the plaintiff's Christian name was misstated, the Court allowed the affidavit to be amended and re-sworn upon payment of the plaintiff's costs of the day. *Cooper* v. *Talbot*, 2 Arnold, 50.

AGREEMENT.

See ASSIGNMENT. CONTRACT, 1, 2, 3. LANDLORD AND TENANT, 1, 2, 3. STAMP.

An agreement by *B.* to serve only for a twelvemonth, and so on from twelvemonth's end to twelvemonth's end, and to give twelve month's notice to quit is bad, under 29 Ch. 2, c. 3, s. 4, as showing no consideration moving from the master. And no consideration can be inferred from the implied promise of the master to pay sufficient wages. *B.* left the plaintiff's service, and afterwards entered into that of defendant:—*Held*, that in an action for harbouring *B.* it was open to defendant to object to the validity of the contract:—*Quære*, whether it would have been so had *B.* been, *de facto*, continuing in the plaintiff's service. *Sykes* v. *Dixon*, 2 Will. Woll. & Hodges, 120.

AMENDMENT.—*See* AFFIDAVIT.

ARBITRATION.

See COSTS, 1.

1. Two arbitrators appointed an umpire by lot, and the parties to the arbitration afterwards assented to the nomination, in ignorance of the mode by which the umpire had been selected:—*Held*, that the appointment was bad. *In re Greenwood*, 2 Wil. Wol. & Hodges, 83.

2. *B.* and a canal company referred all matters in difference between them to arbitration, and by the particulars of his claim before the arbitrators, *B.* claimed a sum then due, and a compensation for future damages. The company claimed a set off. The award recited that all matters in difference had been referred, and that the arbitrators had heard and examined all the evidence and accounts, &c., of each party, and adjudged that there was due from the company to *B.* 515*l.*, which they directed the company to pay him. On motion to set aside the award, as being, 1, not final, it only determining the debt, but not the other matters in dispute; 2, uncertain; 3, doubtful whether or not the set-off had been considered:—*Held*, that the award was good. *In re Brown and the Croydon Canal Company*, 2 Will. Woll. & Hodges, 124.

3. An action and a suit in equity by the defendants against the plaintiffs in the action to restrain them from proceeding were referred, *the costs of the action and of the suit to abide the event of the award.* There were six issues in the action, as to three of which the arbitrator found for the defendants, and as to so much of the suit as regarded them, against the defendants, on the ground of want of equity, they having a legal defence. As to the other three issues, he found for the plaintiffs, with 5*l.* damages; but as to so much of the suit as regarded them, he awarded that the plaintiffs should be restrained, and should not proceed to recover the damages found for them, nor the costs:—*Held*, that the arbitrator had not exceeded his authority. *Reeves* v. *M'Gregor*, 2 Will. Woll. and Hodges, 127

ASSIGNMENT.

See INSOLVENT.

An instrument, by which *A.* agrees to assign a term to *B. on payment of* 200*l.*, and *B.* agrees to indemnify *A.* from the covenants in the original lease, and which contains a stipulation that *A.* should re-enter on non-payment, is only an agreement for an assignment. *Hartshorne* v. *Watson*, 2 Arnold, 70.

ATTORNEY.

See CONTRACT, 2. NEW TRIAL.

An attorney, who had been re-admitted in K. B. in 1823, omitted to take out his certificate till January, 1826, in H. T. of which year he was admitted (for the first time) in C. P., on an affidavit that he was then an attorney of K. B. (which, in fact, he was not, by reason of the omission to take out the certificate for more than a year after his re-admission, under 37 Geo. 3, c. 90, s. 31) :—*Held*, (in the absence of fraud, and after a lapse of 13 years), that, though his admission in C. P. was irregular, it was not void, and the court refused to strike him off the roll *Paget* v. *Chambers*, 2 Arnold, 103.

AWARD.—*See* ARBITRATION, 1, 2. 3.

BANKRUPT.—*See* CONTRACT, 1.

BASTARDY.

1 When a party is summoned for non-payment of money due under an order of filiation, made in pursuance of 49 Geo. 3, c. 68, s. 3, the justice has no power to inquire whether the money due was properly expended, but he is bound to commit the reputed father to the house of correction on default of payment. *The Queen* v. *Codd, Esq.*, 2 Will. Woll. & Hodges, 86.

2. An order of bastardy made under 4 & 5 W. 4, c. 76, s. 72, is bad, unless it alleges that the evidence of the mother of the child was confirmed in some material particular. *The Queen* v. *Read*, 2 Will. Woll. & Hodges, 94.

BILL OF EXCHANGE.—*See* EVIDENCE, 2.

BROKER.—*See* CONTRACT, 2.

CERTIFICATE.—*See* COSTS, 1.

CERTIORARI.

See COSTS, 2. RATE.

By a local act, 3 G. 4, c. cvii, it is enacted, that if a rate is made before three-fourths of the preceding rate is expended, the order for the rate shall contain a proviso suspending the collection till the three-fourths are expended. And an appeal is given if a rate is otherwise made. A rate was made which recited that the three-fourths had been expended, and did not contain the proviso. A party who had not appealed applied for a *certiorari* to bring up the rate on affidavits, showing that the three-fourths had not been expended. The court refused the *certiorari*, on the ground that the proper remedy was by appeal. *The Queen* v. *The Justices of Middlesex*, 2 Will. Woll. & Hodges, 100.

CONTRACT.

See LIMITATIONS, 1. TROVER. NEW TRIAL.

1. In an action by assignees of a bankrupt for breach of contract, in not delivering railway shares, the plaintiffs alleged in their first count, that the bankrupt, before his bankruptcy, and his assignees since, were ready and willing to pay for the shares, it was proved that the bankrupt was insolvent before his bankruptcy, and that after the bankruptcy there were no assets :—*Held*, that this was sufficient for the jury to infer that the bankrupt and his assignees had not been ready and willing to pay *Lawrence* v. *Knowles*, 2 Arnold, 43.

The plaintiffs in their second count alleged readiness and willingness to adopt a contract which was to be performed on the 1st July, 1835 ; but it appeared that no steps were taken by them till January, 1838 :—*Held*, that the length of time was unreasonable, and abandonment of the contract might be inferred. *Id.*

2. The defendant, an attorney and member of a firm, gave a written authority to the plaintiffs (brokers), "*or their agent*, to distrain the *several* goods on the premises" of *A.* (an auctioneer), for rent due to *O.*, and verbally directed them to make the distress *forthwith, as there was a large quantity of furniture in the auction-room.* The plaintiffs' clerk struck out their name from the authority, and substituted that of *W.* (another broker), by whom the distress was made, and with whom the defendant had frequent communications. The greater part of the goods taken under the distress were privileged, as being the property of third parties, sent to *A.* for sale ; the owners brought actions against *W.*, and succeeded ; and *W.* sued the plaintiffs, who were compelled to reimburse him. These facts being submitted in a *case* to the Court, to draw such inferences of fact as a jury might :—*Held*, 1. That there was an implied contract on the part of the defendant to indemnify the plaintiffs for acting according to his directions. (*Semble*, that such an indemnity cannot be implied in the case of an *ordinary* warrant of distress.) 2. That the defendant had assented to the employment of *W.* as the plaintiff's agent. 3. That, under the circumstances, it was not the duty of the plaintiffs to ascertain that the goods were not privileged from distress, and therefore that the defendant could not set up negligence as an answer to the action. 4. That the plaintiffs were entitled to recover the amount of damages recovered against them by *W.* together with the costs of defending that action. 5. That the employment of the plaintiffs having been made by the defendant alone, he could not set off a debt due from them to the firm of which he was a member. *Toplis* v. *Grane*, 2 Arnold, 110.

3. *A.* wrote to *B.* as follows :—"I hereby agree to enter into your service as a weekly manager, to commence next Monday. The amount of payment I am to receive I leave entirely to you to determine."

Held (*Parke*, B. *dissentiente*), that the plaintiff was entitled to some remuneration. *Bryant* v. *Flight*. 2 Horn & Hurls. 84.

COSTS.

See ARBITRATION, 3. CONTRACT, 2. LIMITATIONS, 1.

1. Where a cause had been referred at *nisi prius*, and by reason of the death of the judge, the attorney was prevented from applying for a certificate that the action was a fit one to be tried in the superior Court; the Court refused to order that the plaintiff should have his costs taxed as if such a certificate had been given, it appearing that the order of reference did not authorize the arbitrator to certify. *Astley* v. *Joy*, 2 Will. Woll. & Hodges, 85.

2. The sureties found by a defendant, under the stat 5 *W.* & *M.* c. 11, on removing an indictment, are liable to pay the prosecutor's costs under that statute, though not mentioned in the terms of the recognizance, and though those terms have been strictly complied with. *The Queen* v. *Bryant*, 2 Will. Woll. & Hodges, 113.

3. In an action against magistrates, where there has been a verdict for the defendants, the judge who tried must certify to entitle them to double costs, under 7 *Jac.* 1, c. 5. *Penney* v. *Slade*, 2 Arnold, 75.

COUNTY COURT.—*See* FALSE JUDGMENT.

COUNTY RATE.—*See* RATE.

CREDITOR.—*See* LIMITATIONS, 2, 3, 4, 5, 6.

DAMAGES.

See CONTRACT, 2 3.

In trespass for working the plaintiff's mine, the measure of damage is the value of the material at the pit's mouth, without deducting the expense of getting it. *Martin* v. *Porter*, 2 Horn & Hurls. 70.

DISTRESS.—*See* CONTRACT, 2.

ECCLESIASTICAL COURT.—*See* PROHIBITION.

ESTOPPEL.

See INSOLVENT.

A verdict and judgment against a defendant on a plea of set-off operate as an estoppel in any other action brought by him for the same demand. *Eastmure* v. *Lawes*, 2 Arnold, 54.

EVIDENCE.

See CONTRACT, 1, 2.

1. In an action by partners for a debt due to the firm, where the defendant gives in evidence a receipt by one partner in the names of all, evidence is admissible on behalf of the plaintiffs, to show that the receipt was fraudulently given by the one partner. *Farrar* v. *Hutchinson*, 2 Will. Woll. & Hodges, 106.

2. A bill of exchange purported, in the body of it, to be drawn for "two hundred pounds," but the figures at the top were 245*l*." the stamp was for the larger amount:—*Held*, that, as this was a patent ambiguity, evidence was not admissible to show that it was the intention of the parties to draw the bill for the larger amount, 2nd. That the sum mentioned in words in the body of the bill was that for which it must be taken to be drawn (*Coltman*, J. *dissentiente*.) *Sanderson* v. *Piper*, 2 Arnold, 58.

3. The judgment roll and the writ of execution are sufficient evidence that a benefice has been sequestered, although the judgment roll does not contain an award of the *sequestrari facias*. *Pack* v. *Tarpley*, 2 Will. Woll. & Hodges, 88.

4. In an action against an assignee of a term for rent, a witness who was proved by previous evidence to have been in possession of the premises, and to have paid rent, was called by the plaintiff:—*Held*, that any objection to his competency ought to be taken on the *voir dire*; and that, it being shown he was not assignee, he was a competent witness for the plaintiff. *Hartshorne* v. *Watson*, Arnold, 70.

5. A testator by his will devised lands to his grandson, "*John H. eldest* son of *John H.*" (the testator's son). At the time of making will, *Simon*, the lessor of the plaintiff, was the eldest son of *John H.* by his first marriage, and *John H.*, the defendant, was the eldest son of *John H.* by his second marriage:—*Held*, that the testator's instructions for his will, and his declarations subsequent to its execution, were not admissible in evidence to explain the will. The only case in which evidence of a testator's intention is admissible, is where the meaning of his words is clear, and the will on the face of it is intelligible, but from some of the circumstances proved an ambiguity arises, which of two or more things or persons *each answering the words of the will*, the testator intended to express. But where the description in the will *applies partially* to two or more persons or things, evidence of the testator's intention in making his will is not admissible. The judge at the trial is to form his opinion from the surrounding facts to be found by the jury, and direct them accordingly, and where the facts do not enable him so to direct them, *semble*, that the devise is void for uncertainty. *Doe* d. *Hiscocks* v. *Hiscocks*, 2 Horn & Hurls. 54.

FALSE JUDGMENT.

1. A return to a writ of false judgment in the County Court, that the defendant had not given security to prosecute his suit:—*Held*, insufficient, and quashed but without costs. *Croots* v. *Longden*, Arnold, 49.

2. The 6th section of 19 Geo. 3, c. 70, refers to cases removed from inferior courts before judgment *Id.*

FRAUDS, STATUTE OF.—*See* AGREEMENT

FREIGHT.—*See* INSURANCE.

HABEAS CORPUS.—*See* PRISONER.

HUSBAND AND WIFE.—*See* PLEADING, 4. POOR, 1.

INDEMNITY.—*See* CONTRACT, 2. LIMITATIONS, 1.

INFERIOR COURT.—*See* FALSE JUDGMENT, 1, 2.

INSOLVENT.

See LIMITATIONS, 7.

An insolvent having several executions in his house, at the suggestion of the defendant, who was one of his creditors, executed an assignment to him of all his effects for the benefit of such creditors as should come in and sign the deed. The deed recited that the insolvent "had proposed" the assignment. The execution creditors were accordingly paid their claims, and the defendant taking possession of the goods and premises, carried on the business for some time, when he sold the whole concern for a larger amount than it would have realized if it had been disposed of by the sheriff. The deed was signed by several of the execution creditors. The insolvent, within three months from the assignment went to prison, and afterwards obtained his discharge under the Insolvent Act:—*Held*, that this deed was not voluntary within the meaning of the 7 Geo. 4, c. 57, s. 32, and that the defendant was not estopped by the recital in the deed of assignment from contending that the deed was not voluntary. *Knight* v. *Fergusson*, 2 Horn. & Hurls. 59.

INSURANCE.

A policy of insurance was effected by the owners of a ship upon freight, at and from any port on the *Coromandel* coast, against perils of the sea and all other perils, &c. The ship having sprung a leak in her outward voyage put into a port on the coast of *C.*, and was hove into dock there for repair. During the progress of the repairs the owners purchased a homeward cargo, which was deposited in a warehouse seven miles distant from the dock, but was otherwise ready to be shipped. After the completion of the repairs, the ship was again damaged by a failure in the mechanical process used to remove her from the dock, (her sides being stove in by cables, or columns of sand, used for her support), whereupon, an abandonment was decreed, and she was broken up:—*Held*, first, that the plaintiff's interest in the homeward cargo was correctly described as *freight*; secondly, that as such cargo was ready to be shipped, and the ship was ready to receive it, the risk had attached at the time of the loss; and, thirdly, that the loss was occasioned by one of the perils insured against. *Devaux* v. *Janson*, 2 Arnold, 82.

INTEREST.—*See* PROMISSORY NOTE.

JUDGMENT.—*See* ESTOPPEL.

JUSTICES.—*See* BASTARDY, 1, 2. COSTS, 3. POOR. RATE. SEQUESTRATION, 1, 2.

LANDLORD AND TENANT.

1. By an agreement, land was let for one year, and so on from year to year, until the tenancy should be determined as after-mentioned. Two provisos were afterwards mentioned. 1. That three months' notice should be sufficient notice. 2. That the tenancy might be determined by either party giving the other three months' notice:—*Held*, that the tenancy was not determinable by three months' notice, expiring at the end of the first year. *Doe* d. *Chadborn* v. *Green*, 2 Will. Woll. & Hodges, 122.

2. The following contract was entered into between a landlord and his tenant, the latter being in possession of a farm under a demise from year to year.—*P.* (the landlord) agrees to let the farm to *B.* (the tenant), for the term of 14 years, determinable at the end of seven years, at the option of either party, upon giving 12 months' previous notice; at the yearly rent of 20*l.*, payable half-yearly; a lease to be drawn up on the usual terms by Mr. *Bishop*":—*Held*, that this was a lease of the farm, and not an agreement for a lease. *Doe* d. *Philip* v. *Benjamin*, 2 Wil. Wol. & Hodges, 96.

3. By an instrument dated 13th December, 1834, *A.*, in consideration of the rents, covenants, and agreements therein-after mentioned, agreed to grant to *B.* a lease of certain premises; *habendum* for two years and three quarters, wanting seven days, from the 25th December instant, paying a certain rent quarterly, the first payment to be made on the 25th March then next, which said indenture should contain covenants to pay rent and such other covenants as were contained in a lease referred to, and until such lease should have been granted as aforesaid it *should be lawful for A. to distrain* for all or any part of the rent which might become due in respect of the premises at any time after the execution of the agreement:—*Held*, that the instrument amounted to an agreement only, and not to a present demise. *Bicknell* v. *Hood*, 2 Horn. & Hurls. 86.

LEASE.—*See* LANDLORD AND TENANT, 1, 2, 3. STAMP.

LEGACY DUTY.

A testator by will, after giving certain legacies, bequeathed to his executors, &c., the residue of his estate, real and personal, upon trust, at such times as they should think fit, to *sell, convey, or otherwise convert into money*, the same or any part thereof. He also directed that the residue of his estate should be invested as it should be realized, and should be divided amongst his children in certain specified shares and proportions; that in case any of his daughters should marry under twenty-one, the trustees should settle her fortune upon such trusts as are specified in the will of testator's father, with respect to certain bequests of *personal property* to testator's sisters; and he directed that the trustees should have full power in making such sales, of *causing any part of the real or personal estate to be valued instead of being sold, and of allotting such part to any of his children at the amount of the valuation*, as part of his or her proportion of his residuary estate. *but to be considered*

The trustees sold the personal and a large portion of the real estate; and the residue of the real estate they caused to be valued, and allotted the same to the son at the amount of valuation. The proceeds of the estate, which had been sold, they divided amongst the daughters, according to the respective shares:—*Held*, that legacy duty was payable only on the amount of that part of the estate which had been actually sold. *Attorney-General* v. *Mangles*, 2 Horn & Hurls. 74.

LIMITATIONS, STATUTE OF.

1. Upon a contract to indemnify against costs, the right of action does not vest in the party indemnified, so as to be affected by the statute of limitations, until the costs have been actually paid by him. *Collinge* v. *Heywood*, 2 Will. Woll. & Hodges, 107.

2. The mere existence of cross demands between parties, without a written statement of accounts, is not sufficient to take a case out of the Statute of Limitations, since Lord *Tenderden's* Act. *Mills* v. *Fowkes*, 2 Arnold, 62.

3. Where there is a debt, one portion of which is barred by the Statute of Limitations, and the other is not, and a part payment is made, without its being ascribed to any particular portion of the debt, it will not take the earlier portion out of the statute. *Id.*

4. But the creditor, in such case, may appropriate the payment to the liquidation of the portion. *Id.*

5. And *semble*, that he may do so at any time before action brought. *Id.*

6. At any rate he may do so within a reasonable time. *Id.*

7. Though the Insolvent Act, 52 Geo. 3, c. 164, s. 54, reserves to creditors a right of payment out of the future effects of an insolvent, yet it does not prevent the operation of the Statute of Limitations. *Browning* v. *Paris*, 2 Horn & Hurls. 65.

MAGISTRATES.—*See* JUSTICES.

MANDAMUS.—*See* RATE. SAVINGS BANK.

MASTER AND SERVANT.

See AGREEMENT. CONTRACT, 3.

If a clerk who is under a yearly hiring sets up a claim to be a partner in his master's business, the master is justified in dismissing him immediately from his service. *Amor* v. *Fearon*, 2 Will. Woll. & Hodges, 81.

MINES.—*See* DAMAGES.

NEW TRIAL.

In an action by a hotel-keeper against an attorney, for refreshments supplied to witnesses during the trial of a cause, it appeared that the party in that cause had been to the hotel and desired his witnesses to have what they wanted, and that either the defendant, or some one transacting the business on his behalf, had been backwards and forwards in the hotel while the witnesses were partaking of refreshments:—*Held*, on a motion for a *nonsuit*, that there was *some* evidence to go to the jury that the credit was given to the defendant.—(*Coltman*, J., *dubitante*.) *Fendal* v. *Nokes*, 2 Arnold, 101.

NOTICE TO QUIT.—*See* LANDLORD AND TENANT, 1.

ORDER.—*See* BASTARDY, 1, 2. POOR, 1, 2, 3.

PARTNER.—*See* EVIDENCE, 1.

PATENT.

The plaintiff took out a patent for "new and improved machinery for preparing and spinning flax by power," and by his specification the invention was declared to consist of new machinery for macerating flax previous to drawing and spinning it, and also of improved machinery for spinning the same after having been so prepared. This latter improvement was declared to consist in placing the drawing rollers only two and a-half inches from the retaining rollers. The maceration of flax, as a preparation for spinning, was found to be a new invention; but before the patent, it was a fundamental principle of dry spinning that the length of the reach could be varied according to the length of the fibre of the article to be spun, by placing the drawing rollers at different distances from the retaining rollers:—*Held*, therefore, that as the patent was taken out for an invention, consisting of two distinct parts, one of which was not new, the whole was void. *Kay* v. *Marshall*, 2 Arnold, 78.

PAYMENT.—*See* EVIDENCE, 1. PLEADING, 5.

PENALTY.—*See* SEQUESTRATION, 1.

PLEADING.

See INSURANCE. TROVER.

1. In *assumpsit* for 100*l.* for work and labour, the plaintiff delivered particulars, claiming 96*l.*, "being the balance due." The defendant pleaded *payment* of the 100*l.* mentioned in the declaration. It was proved that he had admitted the balance to be due; but he proved payment of sums more than sufficient to cover the sum claimed by the declaration:—*Held*, that the plaintiff was not bound to new assign. The doctrine of new assignment only applies where there is a possibility of mistake as to what the plaintiff's cause of action may be. (Per *Tindal*, C. J.) *James* v. *Lingham*, 2 Arnold, 97.

2. The defendant, in an action for assault, having obtained a verdict upon a plea of *son-assault demesne*, the court refused to enter a verdict for him also on the general issue. *Mullins* v. *Scott*, 2 Arnold, 96.

3. The first count of a declaration in case stated a demise by the plaintiffs of a factory, with steam-engine, boiler, and alleged as a breach that the defendants had disannexed and removed the boiler, and converted it to their own use, to the injury of the plaintiffs reversion. The second count was in trover. *Semble*, that both counts were not allowable. *Weeton v. Woodcock*, 2 Horn & Hurls. 63.

4. Lands were demised to *A.* and his wife for twenty-one years, renewable upon payment of a fine. *A.* demised to the tenant in possession:—*Held*, that *A.* might sue alone for an injury to the reversion, and that even if it were necessary to join the wife, the objection could only be taken by plea in abatement. *Wallis* v. *Harrison*, 2 Horn & Hurls. 65.

5. Pleas of payment and set-off are not divisible, unless the sums proved under them, taken together with the other pleas, afford an answer to the *whole* cause of action. *Tuck* v. *Tuck*, 2 Horn & Hurls. 71.

POLICY.—*See* INSURANCE.

POOR.

See BASTARDY, 1, 2. RATE.

1. It is against the policy of the law to separate husband and wife; therefore an order for the removal of a married woman is bad, in a case where her husband was undergoing a sentence of imprisonment for debt, in a gaol situate in the parish in which the wife resided. *The Queen* v. *The Inhabitants of Stogumber*, 2 Will. Woll. & Hodges, 95.

2. A pauper took a house at a yearly rent, payable quarterly, the tenancy determinable by a quarter's notice at any period. At the end of the first quarter he said the rent was too high, and that he should quit. His landlady said if he would remain she would take off 10*s.* per quarter from the rent. This was agreed to and acted upon. The pauper quitted and locked up the house, leaving some few things in it, ten days before the end of the year, and offered the key to his landlady. She refused it, and he retained it till the end of the year, paying rent for the whole year:—*Held*, to be a yearly tenancy, and an occupation under 6 *G.* 4, c. 57, s. 2. *Rex* v. *St. Mary Kalendar*, 103.

3. The pauper was rated to all rates during the year, and paid them, except the last, which was made five days before the end of the year, and published four days after:—*Held*, that he gained a settlement *by the payment of rates*, and that the 4 & 5 *W.* 4, c. 76, s. 66, which enacts that a person shall not gain a settlement "*by occupying a tenement*," unless he shall have been assessed to and paid the poor-rate in respect thereof for a year did not apply. *Semble*, that when payment of rates for a whole year is material, that non-publication of a rate made within the year is no excuse for non payment of it. *Id.*

PRACTICE.

See AFFIDAVIT. PRISONER. PLEADING, 2, 3, 4, 5.

Where a special case was reserved, and before it is agreed on between the parties, and put down for argument, the defendant died, which fact was concealed for more than two years, until after the case was argued, the Court refused to allow the plaintiff to enter up judgment of the term before the defendant's death. *Doe* d. *Taylor* v. *Crisp*, 2 Will. Woll. & Hodges, 117.

PRISONER.

Where a defendant is in custody under military arrest, the Court will not grant a *habeas corpus* for the purpose of charging him in execution. *Jones* v. *Danvers*, 2 Horn. & Hurls. 84.

PROHIBITION.

1. In a suit for tithes in the Ecclesiastical Court, if that court is about to try a question whether the tithes sued for are a portion of the tithes of another rectory, a prohibition will be granted. *Cardew* v. *Cotty*, 2 Will. Woll. & Hodges, 110.

2. In a suit for tithes in the Ecclesiastical Court, the defendant pleaded, that the term probatory to prove it having expired, after several extensions, without it being proved, the defendant was decreed to put in his personal answer; that having been put, it was pronounced insufficient, and a further answer decreed:—*Held*, that in that stage the defendant could not have a prohibition, on the ground that the plea raised questions which the Ecclesiastical Court could not try. *Id.*

PROMISSORY NOTE.

A. agreed with *B.* to lend 200*l.* at interest after the rate of 1*s.* in the pound per month, and, for the purpose of evading the usury laws, the sums advanced were to be secured by promissory notes, payable one month after date, and renewable when due, and for each renewal 1*s.* in the pound was to be paid:—*Held*, that the notes were rendered valid by the 3 & 4 Will. 4, c. 98, s. 7, and 7 Will. 4, and 1 Vic. c. 80. *Holt* v. *Miers*, 2 Horn. & Hurls. 80.

QUALIFICATION.—*See* SEQUESTRATION, 1.

RATE.

See POOR, 3.

On appeal against a county rate, the sessions dismissed the appeal, subject to a case. The *certiorari* directed the justices to send up the order of sessions, with all things touching the same. Under this the rate itself was not removed. The *Queen's Bench* quashed the order. On application at the next sessions, the magistrates refused to quash the rate, on the ground that they had no power, as the case was no longer before them.

The Court of *Queen's Bench* refused a *mandamus* to enter continuances to quash the rate, on the ground that—

1. If the rate were quashed otherwise than by *certiorari* parties who had acted under it would not be protected by 12 G. 2, c. 29, s. 11, against actions. *The Queen* v. *The Justices of Middlesex*, 2 Will. Woll. & Hodges, 100.

2. That a court could not dictate to the sessions in a matter judicial. *Id.*

3. That the sessions had not the power, at the time of the application, to do the act required. *Id.*

RECOGNIZANCE.—*See* COSTS, 2.

SAVINGS BANK.

The Savings' Bank Act (9 Geo. 4, c. 92, s. 45), enacts, that if any dispute shall arise between any such institution and the next of kin of a deceased depositor, such dispute shall be settled by arbitration. Upon an application for a *mandamus* to compel the trustees of a savings' bank to nominate an arbitrator to proceed under this clause, it was held a sufficient answer to the application to show that the depositor died twelve years before the application was made, and that by a rule of the bank, all demands by next of kin were required to be made within seven years from the death of the party depositing any money. *The Queen* v. *The Trustees of the Northwich Savings Bank.*

SEQUESTRATION.

SET OFF.—*See* CONTRACT 2. ESTOPPEL. PLEADING 5.

SESSIONS.—*See* CERTIORARI. RATE. POOR, 1, 2, 3

SETTLEMENT.—*See* POOR, 1, 2, 3.

1. A sequestration is a charge upon the rents and profits of a benefice, except the parsonage house, in which the incumbent is bound to reside; and therefore the vicar of a living under sequestration, whose parsonage house is not worth 100*l.* a year, has no estate "of the clear yearly value of 100*l.* over and above all incumbrances that affect the same," so as to qualify him to act as a justice of the peace under 18 Geo. 2, c. 20; neither does it make any difference that the vicar is licensed by the bishop to serve the cure whilst under sequestration, with a stipend of 120*l. per annum*, to be paid out of the proceeds of the vicarage.

2. In an action to recover the penalty under 18 Geo. 2, c. 20:—*Held*, that it was sufficient to show that the sequestrator was in possession under the writ of sequestration, and that he had received the profits, and that it was immaterial whether he had disposed of them properly. *Pack, qui tam*, v. *Tarpley, Clerk*, 2 Will. Woll. & Hodges, 88.

SHIPS.—*See* INSURANCE.

SPECIAL CASE.—*See* PRACTICE.

STATUTES *referred to*

7 Jac. 1, c. 5.

Penney v *Slade*, 2 Arnold, 75.

5 W. & M. c. 11.

The Queen v. *Bezant*, 2 Will. Woll. & Hodges. 113.

8 & 9 Will. 3, c. 35.

The Queen v. *Bezant*, 2 Will. Woll. & Hodges, 113.

18 Geo. 2, c. 20.

Pack v. *Tarpley*, 2 Will. Woll. & Hodges, 88.

19 Geo. 3, c. 70

Croots v. *Longden*, 2 Arnold, 49.

37 Geo. 3, c. 90.

Paget v. *Chambers*, 2 Arnold, 103.

49 Geo. 3, c. 68.

The Queen v. *Codd*, 2 Will. Woll. & Hodges, 73.

52 Geo. 3, c. 164.

Browning v. *Paris*, 2 Horn. & Huls

8 Geo. 4, c. cvii.

The Queen v *Justices of Middlesex*, 2 Will. Woll. & Hodges, 100

6 Geo. 4, c. 57.

Rex v. *Inhabitants of St. Mary Kalendar*, 2 Will. Woll. & Hodges, 103.

7 Geo. 4, c. 57.

Knight v. *Fergusson*, 2 Horn. & Hurls. 59.

9 Geo. 4, c. 14.

Mills v. *Fowkes*, 2 Arnold, 62.

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Browning v. *Paris*, 2 Horn. & Hurls. 62.

———, c. 92.

The Queen v. *Trustees of Northwich Savings Bank*, 2 Will. Woll. & Hodges.

3 & 4 W. 4, c. 98.

Holt v. *Miers*, 2 Horn & Hurls. 80.

4 & 5 W. 4, c. 76.

The Queen v. *Read*, 2 Will. Woll. & Hodges., 94.

——— *The Queen* v. *St. Mary Kalendar*, 2 *ib.* 103.

1 Vict. c. 80.

Holt v. *Miers*, 2 Horn & Hurls. 80.

STAMP.

Where an instrument was put in evidence as agreement, properly stamped, but during the

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it was subsequently relied upon as a lease:—*Held*, that the objection to its inadmissibility, for want of a proper stamp, ought to have been taken at that period of the trial when it was first tendered in evidence as a lease. *Doe* d. *Phillip* v. *Benjamin*, 2 Will. Woll. & Hodges, 96.

STOPPAGE IN TRANSITU.—*See* TROVER.

TITHES.—*See* PROHIBITION.

TRESPASS.—*See* DAMAGES. PLEADING, 3.

TROVER.

See PLEADING, 3.

The defendants sold some wheat to the plaintiffs, which was to be shipped and forwarded to them, and by the contract of sale the plaintiffs, upon receipt of the invoice and bill of lading, were to transmit a banker's draft to the defendants for the amount. The wheat was shipped, and the invoice and bill of lading forwarded to the plaintiffs, but they, instead of a banker's draft, transmitted an acceptance of their own for the amount; whereupon the defendants stopped the wheat in the hands of carrier, and resold it to another party:—*Held*, that even supposing the right of *property* in the wheat had vested in the plaintiffs, as the right of *possession* had not (by reason of the non-payment by them according to the contract,) they could not maintain *trover* for the conversion of the wheat by the defendants. *Wilmshurst* v. *Booker*, 2 Arnold, 91.

VENDOR AND VENDEE.—*See* CONTRACT 1 TROVER.

USURY.—*See* PROMISSORY NOTE.

UMPIRE. *See* ARBITRATION 1.

WAGER.

A wager as to the event of the trial of a person charged with a criminal offence is illegal, as being contrary to public policy. *Evans* v. *Jones*, 2 Horn. & Hurls. 67.

WAGES.—*See* AGREEMENT. CONTRACT, 3. MASTER AND SERVANT.

WILL.—*See* EVIDENCE, 5. LEGACY DUTY.

WITNESS.—*See* EVIDENCE, 4.

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